DOCKET

No. 07-615
Title: Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, Petitioner
v.
Dariush Elahi
Docketed: November 9, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-55015)
Decision Date: May 30, 2007
Rehearing Denied: July 17, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 18 2007	Application (07A247) to extend the time to file a petition for a writ of certiorari from October 15, 2007 to November 14, 2007, submitted to Justice Kennedy.
Sep 24 2007	Application (07A247) granted by Justice Kennedy extending the time to file until November 14, 2007.
Nov 7 2007	Petition for a writ of certiorari filed. (Response due December 10, 2007)
Nov 20 2007	Order extending time to file response to petition to and including January 9, 2008.
Jan 8 2008	Brief of respondent Dariush Elahi in opposition filed.
Jan 17 2008	Reply of petitioner Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran filed.
Jan 23 2008	DISTRIBUTED for Conference of February 15, 2008.
Feb 19 2008	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 23 2008	Brief amicus curiae of United States filed.
May 30 2008	Supplemental brief of respondent in response to brief amicus curiae of the United States filed.
Jun 3 2008	DISTRIBUTED for Conference of June 19, 2008.
Jun 4 2008	Supplemental brief of petitioner Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran filed. (Distributed)
Jun 23 2008	Petition GRANTED.
Jul 15 2008	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 8, 2008.
Jul 15 2008	The time within which to file respondent's brief on the merits is extended to and including November 12, 2008.
Sep 8 2008	Joint appendix filed. (Statement of costs filed)
Sep 8 2008	Brief of petitioner Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran filed.
Sep 15 2008	Brief amicus curiae of United States filed.
Nov 4 2008	CIRCULATED.
Nov 7 2008	SET FOR ARGUMENT ON Monday, January 12, 2009.
Nov 12 2008	Brief of respondent Dariush Elahi filed. (Distributed)
Nov 19 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Nov 26 2008	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)
Dec 1 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 10 2008	Reply of petitioner Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran filed. (Distributed)
Dec 11 2008	Record received from the U.S.D.C. for the Southern District of California. (1 box).
Jan 12 2009	Argued. For petitioner: David J. Bederman, Atlanta, GA For United States as amicus curiae: Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Carter G. Phillips, Washington, D.C.
Jan 16 2009	Letter and attachment received from counsel for the respondent. (Distributed).

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PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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07-615 NOV 7 - 2007

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No. 07-_____

In The
Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an attachment against foreign sovereign property permissible when that property is "at issue in claims against the United States before an international tribunal," and that property is not a "blocked asset," pursuant to the terms of the 2000 Victims of Trafficking and Violence Protection Act and the 2002 Terrorism Risk Insurance Act?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption. In earlier proceedings, Cubic Defense Systems, Inc., participated as a nominal party, and Stephen M. Flatow was a plaintiff-intervenor in the district court and an appellant in the court of appeals. See App. 38, 81.

RULE 29.6 NOTICE

Petitioner, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, is a constituent part of a foreign state, within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a), and has no shareholders or parent corporations. See App. 25.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD"), respectfully prays that a writ of certiorari issue to review the July 17, 2007, judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit, of July 17, 2007, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc*, reported at 495 F.3d 1024 (9th Cir. 2007), and is reprinted at App. 5. The Ninth Circuit's denial of a rehearing en banc was issued on July 17, 2007, and is reprinted at App. 4.

The Ninth Circuit opinion was issued in response to a per curiam opinion of this Court, granting a petition for writ of certiorari filed by MOD, vacating an earlier opinion of the Ninth Circuit, and remanding for further proceedings. See 546 U.S. 450 (2006).

That earlier opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit was of October 7, 2004, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc*, was reported at 385 F.3d 1206 (9th Cir. 2004), and is reprinted at App. 38. That decision was from an appeal of an order from the U.S. District Court for the Southern District of California of November 26,

2002, 236 F. Supp.2d 1140 (S.D. Cal. 2002), reprinted at App. 81.

STATEMENT OF JURISDICTION

Petitioner seeks review from the amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of July 17, 2007. The Ninth Circuit denied a petition for rehearing en banc on that same date. App. 4. Petitioner was granted, on September 24, 2007, leave by Circuit Justice Kennedy to file this petition by November 14, 2007.

The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C.§ 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

This Petition implicates a number of aspects of foreign sovereign immunity, as prescribed by Congress under the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1602 et seq. The crucial questions for review by this Court are controlled by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000), App. 107; and by the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002), App. 112.

STATEMENT

1. This is now the second time this matter has come before the Court. In response to an earlier decision by the Ninth Circuit – that the Islamic

Republic of Iran's ("Iran") Ministry of Defense ("MOD") was not entitled to the protections of the Foreign Sovereign Immunities Act (FSIA), as a constituent part of a foreign state under 28 U.S.C.§ 1610(a), for purposes of immunizing its property from attachment or execution – MOD was obliged to seek review from this Court. In a per curiam opinion, this Court granted the petition, vacated the Ninth Circuit's opinion and remanded for a more searching analysis of MOD's status. See 546 U.S. 450, 452-32 (2006) (per curiam).

The Ninth Circuit has now ruled that MOD is, indeed, a constituent part of Iran, and its property is not subject to attachment under FSIA section 1610(a). See App. 28. MOD takes no exception to this ruling. But the Ninth Circuit went on to hold that the property at issue here – a judgment against a military contractor that is at issue in proceedings between Iran and the United States before the Claims Tribunal at The Hague – is subject to attachment under the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000), App. 107; and by the Terrorism Risk Insurance Act (TRIA) of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002), App. 112. That is the subject of the present petition.

2. a. As this Court has consistently observed, Congress legislated the 1976 Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 et seq., in order to "remedy [then existing] problems [with civil actions involving foreign sovereigns as defendants] by enacting . . . a comprehensive statute containing a 'set of legal standards governing claims of immunity in

every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities'." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). The FSIA not only defines foreign sovereigns and their agencies and instrumentalities, see 28 U.S.C.§ 1603; it also establishes rules as to the acquisition of both personal and subject-matter jurisdiction over foreign sovereign defendants. See id. § 1330.

A foreign sovereign defendant is presumed immune from the jurisdiction of the courts of the United States, see id. § 1604, unless the underlying cause of action falls within any of the clearly-enumerated exceptions provided for in the Act. See id. § 1605. In the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, tit. II, § 221, Congress legislated a significant new exception for foreign sovereign immunities, now codified at 28 U.S.C. § 1605(a)(7). This allowed victims of torture, extrajudicial killing, aircraft sabotage, hostage taking (all defined at id. § 1605(e)) or providing material support for such acts, to sue responsible foreign sovereigns, provided that the defendant nation was designated a state-sponsor of terrorism, pursuant to the Export Administration Act, 50 U.S.C. App.§ 2405(j), and that an adequate opportunity to arbitrate the dispute had been exhausted. See 28 U.S.C.§§ 1605(a)(7)(A) & (B).

The FSIA not only establishes the immunity of foreign sovereigns from the plenary jurisdiction of U.S. courts, it also prescribes the immunities of the property

of foreign states from attachment and execution by a U.S. court. Once again, the FSIA establishes a default rule that "the property in the United States of a foreign state shall be immune from attachment arrest and execution. . . ." Id. § 1609. A party seeking to levy such an attachment, arrest or execution on foreign sovereign property must demonstrate that one of the relevant exceptions of FSIA section 1610 applies. Most importantly, any foreign sovereign property to be attached or executed against must be "used for a commercial activity in the United States. . . ." Id. § 1610(a).

In legislating the AEDPA in 1996, Congress also provided a mechanism for parties having judgments against foreign sovereigns, based on the "terrorist-state" exception of FSIA section 1605(a)(7), to enforce those judgments under section 1610 of the FSIA, but within the strictures of the absolute prohibitions of section 1611. As amended, section 1610 allows that if "the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), [then execution or attachment is permissible against the foreign state's commercial property in the United States,] regardless of whether the property is or was involved with the act upon which the claim is based." Id. § 1610(a)(7).

b. Against this backdrop of the FSIA, Congress has enacted other legislation, the complex interplay of which forms the basis of the underlying case and this petition.

In the 2000 Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. No. 106-386, § 2002,

114 Stat. 1464 (2000); App. 107-11, Congress established a system for the payment to individuals of damage awards procured by virtue of suits brought under section 1605(a)(7) of the FSIA. See id. § 2002(a); App. 107-09. This mechanism provided for direct payments from the U.S. Treasury to the affected individual, and for the United States to be subrogated to the interests of such individuals, after payment was made. See id. § 2002(c); App. 110.

Lastly, Congress in 2002 enacted the Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, tit. II, § 201 116 Stat. 2322 (2002), codified at 28 U.S.C.§ 1610 note; App. 112-19. TRIA section 201 permits persons who obtained a judgment against a party on a claim based on an act of terrorism, within the waiver of immunity under FSIA section 1605(a)(7), to execute against or attach the blocked assets of a terrorist party, subject to substantial limitations, in order to satisfy the judgment to the extent of any compensatory damages for which that party has been adjudged liable. See id. § 201(a); App. 112.

One important aspect of applying this statute involves the determination of whether the assets sought to be attached constitute "blocked assets" within the meaning of the enactment. See id. § 201(d)(2); App. 118 (cross-referencing IEEPA, 50 U.S.C.§ 1701 et seq., and the Trading with the Enemy Act, 50 U.S.C. App.§ 5(b)). If a particular property was not characterized as a "blocked asset" under TRIA, it was ineligible for attachment or execution in satisfaction of a judgment procured under FSIA section 1605(a)(7).

TRIA also amended portions of VTVPA

pertaining to the payment system for victims of terrorist attacks having judgments procured against Iran under the waiver of foreign sovereign immunity in FSIA section 1605(a)(7). See TRIA, § 201(c); App. 113-17. The major change made was that individuals who received payments from the U.S. Treasury under the compensation scheme were required to relinquish their rights to subsequently attach any Iranian property in the United States that "is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal." TRIA, § 201(c) (amending VTVPA § 2002(d)(5)(B)); App. 117.

4. The case giving rise to the present petition has as its genesis two separate sets of proceedings, one tragic and controversial, the other governmental and mundane. Both must be understood in order to make sense of the compelling need for review of the issues raised here.

a. As narrated by the court below, see App. 5, on October 23, 1990, Dr. Cyrus Elahi was killed in Paris, France. See *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d 97, 103 (D.D.C. 2000). In 2000, Dr. Elahi's brother, Dariush Elahi, filed suit against Iran and its Ministry of Information and Security ("MOIS") in the District Court for the District of Columbia (the "Elahi proceeding"). The Iranian government did not enter an appearance with that court, and the district court therefore entered a default judgment in favor of Elahi in December 20, 2000. Id. at 99-100. The judgment against Iran was for compensatory damages in the amount of $11,740,035, and punitive damages of $300 million. Id. at 115.

The Elahi proceeding (along with that regarding the claims of Stephen Flatow, see App. 39, 41-42, which are no longer relevant for purposes of the present petition) are part of a larger pattern of collateral litigation, generated by holders of default judgments against certain foreign sovereigns seeking execution or attachment against various forms of property found in the United States. See, e.g., *Flatow v. Alavi Foundation*, 67 F. Supp.2d 535 (D. Md. 1999); *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249 (D.C. Cir. 2002). This litigation arises from these circumstances.

b. In October 1977, the predecessor of the petitioner, the Ministry of Defense ("MOD") of the Islamic Republic of Iran, entered into a pair of contracts with Cubic Defense Systems, Inc., a California-based defense firm, relating to the sale and servicing of equipment (an air combat maneuvering range (ACMR)) for use by the Iranian Air Force. See *Ministry of Def. of the Islamic Republic of Iran v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168, 1170 (S.D. Cal. 1998). Following the Iranian revolution of 1979, the delivery of the equipment did not take place for reasons that were disputed. See id. In September 1991, and pursuant to the terms of the contracts, MOD filed a request for arbitration with the International Chamber of Commerce (ICC) in Zurich, Switzerland. Id. After submissions from both MOD and Cubic, the ICC ruled in favor of MOD and issued a Final Award requiring Cubic to pay MOD $2.8 million. Id. at 1171.

In June 1998, MOD filed a petition in the District Court for the Southern District of California (the "Cubic proceeding"), seeking to confirm the award

entered by the ICC pursuant to the New York Convention, opened for signature June 10, 1958, 21 U.S.T. 2517, reprinted in 9 U.S.C.A.§ 201 note. See 29 F. Supp.2d at 1170. The district court granted MOD's petition and confirmed the ICC Award on December 7, 1998. Id. at 1174. Both Cubic and MOD took cross-appeals of the district court's decision, and those appeals remain pending. The merits of the dispute between MOD and Cubic are not otherwise implicated in this petition.

c. In November 2001, Elahi registered in the Southern District of California the default judgment against the Islamic Republic of Iran, procured in the federal district court for the District of Columbia, 124 F. Supp.2d 97 (D.D.C. 2000). Elahi also filed a lien notice and sought to garnish the judgment debt owed MOD by Cubic. See App. 80-81. Petitioner resisted this attachment or execution, and the district court ruled, in November 2002, that the MOD was not immune from Elahi's action. See App. 106.

Relevant to this petition, the district court ruled that the Cubic judgment was not "at issue" before the Iran-U.S. Claims Tribunal, and, therefore, it was subject to attachment under TRIA. See App. 90-92. The district court also found that MOD's interest in the Cubic judgment arose, for purposes of characterization as a "blocked asset" under TRIA, at the time MOD successfully sought to enforce the ICC arbitral award in a U.S. court. See App. 84, 91; see also 29 F. Supp.2d at 1174.

d. MOD took an appeal to the Ninth Circuit on the district court's rulings favorable to Elahi.

The court of appeals (Betty Fletcher, J., writing) reversed some of the grounds held by the district court, but sustained others. See App. 38.

The Ninth Circuit agreed with the district court's ruling that MOD was liable for satisfaction of Elahi's judgment against a separate ministry and entity of the government of the Islamic Republic of Iran. Despite the fact that it treated the Islamic Republic of Iran as a foreign state under FSIA section 1603(a), and not as an "agency or instrumentality of a foreign state" under FSIA section 1603(b), the court of appeals nonetheless applied the more lenient standard of FSIA section 1610(b)(2), to the Cubic judgment and held that MOD's interest in the Cubic judgment would be subject to attachment by Elahi in satisfaction for his claim against Iran and MOIS. See App. 65-66.

The Ninth Circuit ruled, in addition, that Elahi's attempted attachment of the Cubic judgment did not violate Treasury Regulations, see 31 C.F.R. pts. 535 & 560, concerning the disposition of Iranian assets in the United States. See App. 75-76. Significantly, the panel held that, for purposes of the applicability of these regulations, "MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." App. 76 (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)). See also App. 55 ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree.").

e. As noted above, MOD sought review in this Court on that earlier Ninth Circuit ruling. After

requesting the views of the Solicitor General, 544 U.S. 998 (2005), this Court granted the petition, vacated the panel decision, and remanded for further proceedings. See 546 U.S. 450 (2006) (per curiam). This Court held that the panel may have improperly applied FSIA section 1610(b) (relevant only for "agencies of instrumentalities" of a foreign sovereign), instead of section 1610(a) (which applies to the foreign sovereign itself). See id. at 451-52.

This Court was particularly critical of the panel decision, insofar as it ostensibly relied on a concession by MOD that it was an agency or instrumentality of a foreign sovereign. See id. at 453 ("The court [of appeals] noted that 'Elahi appears to concede' that the Ministry is an 'agency and instrumentality,' but any relevant concession would have to have come from the Ministry, not from Elahi, whose position the concession favors. Thus, in implicitly concluding that the Ministry was an 'agency or instrumentality' of the Islamic Republic of Iran within the meaning of § 1610(b), the Ninth Circuit either mistakenly relied on a concession by respondent that could not possibly bind petitioner, or else erroneously presumed that there was no relevant distinction between a foreign state and its agencies or instrumentalities for purposes of that subsection.") (citations omitted).

f. On remand, the panel (constituted as before, with Judge Betty B. Fletcher writing) ordered further briefing on the FSIA issues, as well as those arising under the VTVPA and TRIA. See App. 9-10. The United States also participated as an amicus supporting the position of MOD. See App. 2, 10. In its

most recent opinion, the panel ruled, consistent with the suggestion by this Court, that MOD was a central organ of Iran, exercising core functions of a foreign sovereign, and that the Cubic judgment was immune under the FSIA section 1610(a) from attachment by Elahi, insofar as the property in dispute was not "used for a commercial activity in the United States." See App. 21-28. MOD concurs with this ruling, which is otherwise not relevant to this petition.

A majority of the panel went on, however, to rule in favor of the validity of Elahi's attachment on alternative grounds, namely, that it complied with the TRIA and VTVPA. The panel held that (1) Elahi had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. Treasury, pursuant to the VTVPA, because the Cubic judgment is not "property that is at issue in claims against the United States before an international tribunal," TRIA, § 201(c)(4); see App. 11-14; and (2) that the Cubic judgment is a "blocked asset" within the specific meaning of TRIA sections 201(a) and 201(d)(2)(A). See App. 15-20.

Circuit Judge Raymond C. Fisher dissented from the panel's holding, see App. 28-37, indicating that Elahi relinquished any right to attach the Cubic judgment, insofar as that property was intimately related to a claim before an international tribunal, within the meaning of TRIA section 201(c)(4). Examining the "at issue" language, and construing the relevant TRIA provisions as a whole, Judge Fisher concluded that the panel improperly assumed that MOD had conceded this issue by virtue of a submission

made at the Iran-U.S. Claims Tribunal. See App. 35-37.

g. Both of the panel holdings are erroneous, and place the Ninth Circuit's jurisprudence in conflict with that of sister circuits over a matter having significant statutory importance and delicate diplomatic implications. This timely petition follows.

REASONS FOR GRANTING THE PETITION

REVIEW IS NEEDED TO CLARIFY FOREIGN SOVEREIGN IMMUNITY FROM ATTACHMENT IN CASES ENTAILING WEIGHTY FOREIGN RELATIONS CONCERNS

This petition invites the Court to resolve a major outstanding area of controversy in the application of foreign sovereign immunities. As this Court has previously noted, "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

It is for these reasons that this Court, in the wise exercise of its plenary review powers, has recently addressed issues of interpretation and application of the Foreign Sovereign Immunities Act (FSIA) and collateral statutes. In *Powerex Corp. v. Reliant Energy*

Services, Inc., this Court held, as a threshold procedural matter, that the statutory bar on review of remand orders is applicable to suits removed under the FSIA. See 127 S.Ct. 2411, 2419-20 (2007). Also last Term, this Court ruled on the jurisdictional immunities enjoyed by diplomatic establishments in the United States in property tax disputes. See *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352 (2007).

This petition raises an equally compelling set of issues regarding foreign sovereign immunities: the protections to be afforded foreign states from execution or attachment in U.S. courts. The FSIA not only governs the jurisdictional immunity of foreign sovereigns in U.S. courts, see 28 U.S.C.§§ 1604, 1605; but also the immunity from attachment and execution of property of a foreign state. See id. §§ 1609-1611. As has already been discussed, the provisions of the attachment/execution immunity provisions of the FSIA interact with other federal statutes regarding claims against, and disposition of, the property of certain foreign sovereigns in the United States. Moreover, the risks of unsettling the United States' foreign relations are enhanced when at issue is the actual seizure and distraint of property owned (or claimed by) a foreign sovereign. It is particularly important in these circumstances that congressionally-enacted rules for the treatment of foreign sovereign property be consistently applied, especially when these provisions were determined by Congress to be consistent with international law. See 28 U.S.C.§ 1602.

At issue in this case are the specific protections

to be afforded foreign sovereign property in U.S. courts, especially against attachment or execution in satisfaction of terrorism-related claims under FSIA section 1605(a)(7). The number of default judgments pursuant to this FSIA provision have escalated in the past decade, involving putatively millions of dollars of claims against such foreign sovereign defendants as Sudan, Libya, Syria, Iraq, and Iran.[1]

Through the VTVPA and TRIA, Congress has legislated an exquisitely-detailed mechanism for the satisfaction of such judgments. But there are substantial restrictions and limitations on the ability of individual litigants to attach foreign sovereign property, as one might expect for such a diplomatically-sensitive area of U.S. foreign relations law.

Two of these restrictions are at issue here. The first is whether an individual relinquishes a right to attach if the property is "at issue in claims against the United States before an international tribunal." TRIA, § 201(c)(4); App. 117. The second involves the definition of a "blocked asset" under the TRIA, see id. § 201(d)(2); App. 118, which is a requisite in order for property to be subject to attachment.

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[1] For a sampling of recent cases in the federal courts of appeals, see, e.g., *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356 (D.C. Cir. 2006); *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192 (D.C. Cir. 2004); *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).

A. The Ninth Circuit's Ruling on TRIA Section 201(c)(4)'s "At Issue" Provision is Based on False Premises, Raises Significant Foreign Relations Issues, and Conflicts With the Holdings of at Least Four Other Circuits.

1. TRIA section 201(c)(4)'s "at issue" clause provides that when an individual, holding a judgment pursuant to FSIA section 1605(a)(7), accepts monetary relief under TRIA and VTVPA, they relinquish the right to attach property of a foreign nation that is "at issue in claims against the United States before an international tribunal." TRIA, § 201(c)(4) (amending VTVPA § 2002(d)(5)(B)); App. 117. The panel's opinion was premised on a false assumption: that Iran, in litigating Case B/61 before the Iran-United States Claims Tribunal in The Hague, somehow conceded that the Cubic judgment was not relevant, or "not at issue" before the Tribunal. See App. 12-13. Like the panel's previous attempt to have MOD concede material legal points in this litigation, which was expressly rejected by this Court, see 546 U.S. at 453, this ground for decision is likewise unavailing.

As was indicated in briefing before the court of appeals, see U.S. Br. 14-16, the Cubic judgment is at issue in Case B/61, pending before the Iran-U.S. Claims Tribunal. Case B/61 involves the status and disposition of Iranian military property or assets situated in the United States, which may or may not have been part of the Foreign Military Sales (FMS) program. Iran seeks the return of these properties or assets, or, in the alternative, the receipt of replacement value for them from the United States government. As

a presidential statement to Congress of May 16, 1996, indicated:

> Case B/61 involves a claim by Iran for compensation with respect to primarily military equipment that Iran alleges it did not receive. Iran had sought to purchase or repair the equipment pursuant to commercial contracts with more than 50 private American companies. Iran alleges that it suffered direct losses and consequential damages in excess of $2 billion in total because of the United States Government refusal to allow the export of the equipment after January 19, 1981, in alleged contravention of the Algiers Accords.

President Clinton's Message to the Congress on Iran, May 16, 1996, available at http://clinton6.nara.gov/1996/05/1996-05-16-report-on-national-emergency-with-respect-to-iran.html (visited Oct. 24, 2007).[2]

One of the pieces of military equipment at issue in Tribunal Case B/61 is Contract Number 134 between MOD and Cubic International Sales Corporation (now Cubic Defense Systems, Inc.) of October 3, 1977, for the sale, repair and maintenance of an Air Combat

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[2] MOD does not endorse, in all respects, the United States government's characterization of Iran's claim in Case B/61, but this statement is nonetheless illustrative of the subject-matter of the case.

Maneuvering Range (ACMR). The Cubic contract for the ACMR was the subject of an arbitration before the International Chamber of Commerce (ICC), which issued an award, on May 5, 1997, in favor of the Islamic Republic of Iran in the amount of $2,805,519. See Declaration of Mina Almassi, Case No. 98-1165, Docket No. 85, ¶ 7 & Exh. 2 (filed Sept. 13, 2002), reproduced at U.S. Br. at A15. That ICC arbitration award was enforced in proceedings below and is now known as the Cubic judgment. Although the Tribunal has yet to issue an award in Case B/61, it has (in another award) indicated that Cubic contract number 134 is at issue in Case B/61. See *Ministry of National Defence of the Islamic Republic of Iran v. United States*, Case No. B/66, Award No. 302-B66-1, at ¶ 10 (Apr. 28, 1987), WL Iran Award 302-B66-1.

As the United States contended before the Ninth Circuit, see U.S. Br. 15-16, the statement in Iran's filing before the Tribunal, in Case B/61 – that the ICC arbitral award was not "res judicata" before the Tribunal – does not affect the determination here. The ICC arbitration established *Cubic's* liability to Iran under Contract 134 for the provision of ACMR; the Tribunal proceedings are intended to determine the *United States'* liability to Iran under the Algiers Accords for interfering with the export of needed supplies, parts, equipment, and expertise to maintain the ACMR.

As Judge Fisher observed in his dissent, App. 28, the decisive matter was Iran's undertaking to offset the proceeds from the ICC award (and, now, the Cubic judgment) from any potential liability that the United

States has with respect to the entirety of Case B/61. Judge Fisher questioned whether Iran made any "concession" (Judge Fisher's quotes, App. 35) at all in this regard. See App. 37.

What is undisputed here is that the United States stands to gain a benefit before the Iran-U.S. Claims Tribunal if the Cubic judgment is repatriated to Iran, and for that reason alone, the Cubic judgment is "at issue" in Case B/61 before the Tribunal, as Judge Fisher noted in his dissent. See App. 32, 36-37. After reviewing the plain meaning of the "at issue" language of the TRIA, Judge Fisher concluded that the Cubic judgment is clearly before the Claims Tribunal under theories of set-off or judicial estoppel. App. 32-33. The requisites of VTVPA section 2002 having been satisfied, Elahi has clearly relinquished any right to attach the Cubic judgment.

2. TRIA section 201(c)(4)'s "at issue" proviso involves significant foreign relations issues, and the court of appeals' holding and interpretation of such raises substantial concerns. In pleadings the Islamic Republic of Iran filed before the Claims Tribunal in Case B/61, Iran has indicated that it will deduct from its claim against the United States any funds that Iran receives from Cubic via the ICC award and (now) the Cubic judgment. The United States, in its memorials before the Tribunal, has acknowledged that "the awards due from Cubic under the ICC Award . . . would be 'recouped from the remedy sought against the United States in Case B61'." U.S. Rebuttal, Case B/61, at 24-25 n.32 (filed Sept. 1, 2003) (quoting 1999 correspondence and filings made by Iran's agent before

the Tribunal at The Hague).

If left unreviewed, the Ninth Circuit's holding would permit Elahi to attach the Cubic judgment, and these funds would thus not be available to Iran and there would be no offset of any award that the United States would be obliged to pay Iran. Because the status of the Cubic judgment will determine the final outcome of Case B/61 in the Iran Claims Tribunal, it is most certainly "at issue in [a] claim[] against the United States before an international tribunal." Indeed, were Elahi to prevail here it would mean that the United States would be satisfying Elahi's judgment against Iran.

It is no wonder that Congress sought to prevent this result – complicating the defense of international litigation in which this country is a party, and deflecting the payment of judgments against foreign sovereigns onto the U.S. taxpayer – by legislating VTVPA section 2002 requiring the relinquishment of recourse against certain classes of Iranian property and assets in the United States. These significant foreign relations concerns strongly counsel this Court to grant review of this petition. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194, 196 (1983)); *Regan v. Wald*, 468 U.S. 222, 242 (1984); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

As this Court noted in another foreign sovereign immunity case, "the primacy of federal concerns is evident" in cases "rais[ing] sensitive issues concerning the foreign relations of the United States." *Verlinden*

B. V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) ("We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."). Finally, this Court has held that it is "not for the courts to deny an immunity which our government has seen fit to allow." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945).

3. Other courts that have considered the issue have given a broad ambit to TRIA section 201(c)(4)'s "at issue in claims against the United States before an international tribunal" language. In *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004), the Seventh Circuit ruled, in regard to the attachment of two condominium units that had previously served as Iranian consular residences, that the property was "at issue" before the Tribunal in a number of cases, raising the United States' obligations under the Algiers Accords to protect and return Iranian property in the United States. See id. at 1008-09 (quoting *Islamic Republic of Iran v. United States*, 33 Iran-U.S. Cl. Trib. Rep. 362 (1997)). The attachments were thus quashed, as having been relinquished under the TRIA. Precisely this same result was reached by the Fourth Circuit. See *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 236 (4th Cir. 2004).

Moreover, as Judge Fisher recounted in his dissent, "other circuits have rebuffed attempts by applicants to attach Iranian property that might become the subject of an award against the United

States before the Claims Tribunal." App. 34 (citing *Hegna* in the Fourth Circuit). Judge Fisher properly noted that Congress chose the "at issue" language to effectuate the purpose of forcing potential claimants to relinquish a broad class of attachments. See App. 31-32 (citing *Hegna* in the Fifth Circuit, which rejected a narrow interpretation of "at issue"). Judge Fisher also observed, App. 30, that TRIA section 201(c)(4) includes not only property "at issue" before an international tribunal, but also the narrower class of property that is "the subject of" resolved claims, suggesting that the "at issue" language was intended to be broader.

The Ninth Circuit opinion is in manifest conflict with at least four other circuits. While the panel majority seemed to acknowledge the split, see App. 14 n.6 (citing the *Hegna* cases in the Second, Fourth, Fifth and Seventh Circuits[3]), it asserted that the other circuit authorities were distinguishable because they "involv[ed] properties that had not yet been subject to any judicial determination of liability." Id. Judge Fisher questioned, in his dissent, the relevance of such a characterization of those precedents. See App. 34. The panel's assertion, see App. 14-15 n.7, that the "at issue" provision should be construed so as not to apply to matters that have already been resolved at the Iran Claims Tribunal, or have already been the subject of

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[3] See *Hegna v. Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492-93 (5th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 (4th Cir. 2004).

awards by that body, is belied by the TRIA's express language.

Moreover, the Ninth Circuit's cramped construction of the "at issue" language in TRIA is in conflict with that of other courts of appeals that have considered the issue. The Fifth Circuit indicated that "'[a]t issue' includes a broader swath of conflict" than asserted by respondent in the proceedings below, or as accepted by the panel majority. See *Hegna*, 376 F.3d at 492 (citing BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "at issue" as "[t]aking opposite sides; under dispute; in question."')). The panel majority implicitly rejected the Fifth Circuit's view, see App. 15 n.7 (criticizing the "broader swath" language of the Fifth Circuit's *Hegna* decision, although without attribution), but offered no coherent construction of its own.

Review is warranted on this significant issue of statutory construction regarding the TRIA's "at issue" provision.

B. The Circuit's Holding That the Cubic Judgment is a "Blocked Asset," Within the Meaning of TRIA Section 201(d)(2)(A), Misconstrues the Statute and Conflicts with the Ruling of Two Other Circuits.

The panel majority ruled, App. 15-20, that the Cubic judgment was a "blocked asset" within the meaning of TR IA, particularly sections 201(a) and 201(d)(2)(A). Curiously, the same panel reached precisely the opposite conclusion in its earlier ruling, see 385 F.3d at 1216, App. 55; id. at 1224, App. 76 (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)), when it

appeared that such would support a holding *against* Iran's immunity from attachment under the FSIA. When this Court vacated the panel's earlier holding on FSIA grounds, the panel reversed course and held that the Cubic judgment is a "blocked asset" under the TRIA.

The Ninth Circuit's earlier holding was correct, based on a reading of the statute and the facts of this case. The panel's holding also conflicts with at least two other courts of appeals that have applied a narrow construction to the "blocked asset" language of TRIA.

1. The Ninth Circuit's holding turns on the technical language of section 201 of TRIA. By its own terms, TRIA applies only to the "blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party). . . ." TRIA, § 201(a); App. 112. The phrase "blocked asset," is, however, given a very specific definition under TRIA, including "any asset seized or frozen by the United States under. . . sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." TRIA, § 201(d)(2)(A); App. 118. Blocked assets also include "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C.App. 5(b))." Id.

Contrary to the Ninth Circuit's most recent holding, the Cubic judgment is "regulated," not "blocked," within the meaning of TRIA section 201(a) because it has neither been "seized" or "frozen" by the United States. See TRIA, § 201(d)(2)(A); App. 118. The Cubic judgment is subject to the general license of 31 C.F.R.§ 535.579(a), because Iran's interest in the Cubic

judgment arose after January 19, 1981. Indeed, the panel said as much in its earlier ruling. See App. 53 ("The combination of these regulations makes clear that the Cubic judgment is properly regulated by the IACR. . . .").

In order to avoid this result, the panel held, see App. 20, that Iran's interest in the property arose in October 1977, when Iran executed the underlying contracts with Cubic, or, at the latest, in October 1978, when Iran made a payment on the contracts. This ruling contradicts the panel's prior opinion. See 385 F.3d at 1216, App. 55 ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree."); id. at 1224, App. 76 ("MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic. *MOD v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168 (S.D. Cal. 1998)."). The property being attached here is *not* the military equipment (the air combat maneuvering range) that was the subject of the underlying transaction between Cubic and MOD; rather, it is MOD's judgment against Cubic, which confirmed an arbitration award for breach of contract.

MOD could not have had any interest in the Cubic judgment, until such time as a U.S. court had recognized as enforceable an international arbitral award granting the Ministry a right of action to collect the award. See 29 F. Supp.2d at 1174. The panel's attempt to "back-date" Iran's potential interest in the Cubic judgment, to a time prior to January 1981,

should be unavailing. The Ninth Circuit's ruling is in substantial tension with that of the Second Circuit, which held that "[t]o seize or freeze assets [under IEEPA] transfers possessory interest in the property." *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003). No such transfer could have occurred here in relation to MOD's interest in the ACMR or the Cubic judgment. Cubic has never made any payment to MOD, in compliance with the arbitral award. The Ninth Circuit has thus given an extraordinarily broad ambit to the definition of "blocked assets" under the TRIA, despite that statute's narrow definition.

The Ninth Circuit's opinion also subverts the United States' foreign policy position vis-à-vis Iranian assets under the Algiers Accords, the international agreement which established the Iran Claims Tribunal and which has governed this nation's financial relations with Iran since 1981.[4] The panel decision potentially places the United States in a position of judicially-declared default on its obligations under the Algiers Accords. Needless to say, this Court has long held the view that "an act of Congress ought never to be construed to violate the law of nations if any other

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[4] See Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Iran-U.S., ¶¶ 4-9, 20 I.L.M. [International Legal Materials] 224 (1981) (the United States committed itself to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979" and "to ensure the mobility and free transfer of Iranian assets within its jurisdiction."); Dept. of State Bull. No. 2047, Feb. 1981 at 1; 1 Iran-U.S. Cl. Trib. Rep. 3 (1983).

possible construction remains. . . ." *Murray v. The Schooner CHARMING BETSY*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (cited with approval in *F. Hoffmann-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)).

Even if the panel's factual supposition is true (that Iran's interest in the Cubic judgment arose prior to January 1981), the Algiers Accords and presidential determinations thereafter, had the effect of unblocking most Iranian assets in this country. See *Rubin v. Islamic Republic of Iran*, 2007 WL 1169701, at *4 (N.D. Ill. Apr. 17, 2007); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63, 67 (E.D.N.Y. 2004). Assets blocked by Executive Order [EO] 12170, were later unblocked by EOs 12281, 12282, and 1283. See, e.g., 31 C.F.R.§ 535.215. If the panel was correct in its holding, all interests which Iran had in the United States as of November 14, 1979, have remained blocked, placing the United States in manifest violation of the Algiers Accords, and subject to remedial proceedings at the Iran-U.S. Claims Tribunal.

2. A number of courts have held that not all assets regulated by Executive Order 12170, 44 Fed Reg. 65729 (1979), constitute "blocked assets" under the TRIA. In *Weinstein v. The Islamic Republic of Iran*, 299 F. Supp.2d 63 (E.D.N.Y. 2004), the United States District Court for the Eastern District of New York noted that

> the TRIA defines a "blocked asset" as any asset "seized or frozen" by the United

> States under IEEPA §§ 202 and 203. Unfortunately, these terms are not further defined in the TRIA. And the terms "seized" and "frozen" do not appear in §§ 202 and 203 of the IEEPA, 50 U.S.C. §§ 1701and 1702. According to plaintiffs, the Court should therefore resort to the legislative history of the statute for interpretation. In plaintiffs' view, the legislative history of the TRIA demonstrates that the term "blocked assets" under the TRIA is an "omnibus term encompassing all Iranian assets which have been blocked, frozen, seized, restricted or otherwise regulated by any proclamation, order, regulation or license issued pursuant to IEEPA." Pls.' Mem. at 21.

Id. at 74.

In short, the *Weinstein* court was faced with the exact circumstances as presented below — a claim under TRIA for seizure of liquidated funds of the Islamic Republic of Iran — and the same assertion by claimants (that all property blocked by EO 12170 are necessarily "blocked assets" under TRIA). Nevertheless, that court "rejected plaintiff's arguments that all Iranian assets which entered U.S. jurisdiction after the 1979 blocking order, i.e., EO 12170, are 'blocked assets' within the meaning of the TRIA, and that the term 'blocked assets' includes all assets 'regulated' or 'licensed' under IEEPA." Id. at 33. The court went on to further note that "blocked assets"

should not be read to be an "omnibus" term, but rather one which was specifically limited by the language of TRIA to assets "seized or frozen by the United States under specified statutes, one of which is the IEEPA." Id. at 75.

The *Weinstein* court's conclusion and reasoning was specifically adopted by the Second Circuit in *Bank of New York v. Rubin*, 484 F.3d 149 (2d Cir. 2007). In *Rubin*, the interpleaders sought to attach bank accounts at the Bank of New York held on account for Bank Melli Iran. The Second Circuit held

> that assets blocked pursuant to Executive Order 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979), and its accompanying regulations, see 31 C.F.R. Part 535, that are also subject to the general license of 31 C.F.R.§ 535.579, are not blocked assets under the TRIA and therefore are not subject to attachment under that statute.

484 F.3d at 150. The Second Circuit has thus endorsed a narrow construction of the "blocked assets" language of the TRIA, at variance with the Ninth Circuit's holding. See also *Hegna*, 376 F.3d at 493 n.32 (5th Cir. 2004) (noting limited definition of "blocked assets" under TRIA section 201(d)(2)); *Weininger v. Castro*, 462 F. Supp.2d 457, 480 (S.D.N.Y. 2006); *Rubin v. Islamic Republic of Iran*, 456 F. Supp.2d 228, 235 (D. Mass. 2006).

3. There is no indication that the Cubic judgment has been "seized or frozen by the United States," in the manner contemplated by TRIA section 201(d)(2)(A). On its own terms, then, TRIA is

inapplicable in this case. The Ninth Circuit's judgment, if left unreviewed, will vastly complicate the United States' foreign policy interests in regards to the Islamic Republic of Iran and compromise this country's obligations under the Algiers Accords. Just as the views of the Solicitor General were requested when this matter was previously before the Court, see 544 U.S. 998 (2005), they should again be sought in this instance.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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November 13, 2007

Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, as Successor in Interest to the Ministry of War of the Government Iran,

Plaintiff-Appellant,

v.

CUBIC DEFENSE SYSTEMS, INC., as Successor in Interest to Cubic International Sales Corporation,

Defendant,

v.

DARIUSH ELAHI,

Intervenor-Appellee.

No. 03-55015

D.C. No. CV-98-01165-RMB

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted
January 26, 2007 – Pasadena, California

Filed May 30, 2007
Amended July 17, 2007

Before: Betty B. Fletcher, Kim McLane Wardlaw, and Raymond C. Fisher, Circuit Judges

Opinion by Judge B. Fletcher;
Dissent by Judge Fisher.

COUNSEL

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ORDER

The opinion filed on May 30, 2007 is amended as follows:

On slip opinion page 6405, footnote 2, line 2, replace the phrase ", not against private parties" with "and counterclaims arising from the same transactions." At the end of that paragraph after "*See* Claims Settlement Declaration . . . http://www.iusct.org/claims-settlement.pdf" add the following citation: "; *see also* Case A/2, 1 Iran-U.S. C.T.R. 101, Dec. 1-A2-FT (Jan. 26, 1982)."

On slip opinion page 6410, line 19, beginning with "Further, as noted *supra,* the Tribunal has no jurisdiction over claims against private parties" add ", having jurisdiction only to hear counterclaims against such parties."

On slip opinion page 6415, line one, from "Subsequently, President Carter issued Executive Order 12,282 . . . " and ending on line 31 with " . . . revoked or repealed")." delete and replace with the following":

> Following release of the hostages, the United States unblocked most Iranian assets and lifted the trade embargo. *See* Exec. Order Nos. 12,276-12,283, 46 Fed. Reg. 7913-7929 (Jan. 19, 1981); Iranian Assets Control Regulations, 46 Fed. Reg. 14330-14337 (Feb. 26, 1981) (codified at 31 C.F.R. pt. 535). However, military goods such as the ACMR remained blocked. *See* 22 U.S.C. §§ 2751 *et seq.*; Exec. Order No. 12,170, 44 Fed. Reg. 65729 (Nov. 14, 1979); Notice of President, 70 Fed. Reg. 69039 (Nov. 9, 2005); International Traffic in Arms Regulations, 22 C.F.R. §§ 120-30; OFFICE OF FOREIGN ASSETS CONTROL, DEP'T. OF TREAS., FOREIGN ASSETS CONTROL REGULATIONS FOR EXPORTERS AND IMPORTERS 23 (2007) ("Certain assets related to these claims remain blocked in the United States and consist mainly of military and dual-use property").
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> The Ministry argues that the Cubic judgment is not a blocked asset under TRIA because Executive Order 12,282 unblocked

certain Iranian assets. In support of its argument, MOD cites two cases in which district courts found that TRIA did not permit the attachment of Iranian property because the assets at issue did not fall within TRIA's definition of "blocked assets." *See Bank of New York v. Rubin,* 2006 WL 633315 (S.D.N.Y. Mar. 15, 2006); *Weinstein v. Islamic Republic of Iran,* 299 F. Supp. 2d 63 (E.D.N.Y. 2004). However, the reasoning in those cases is inapplicable here. Iran's interest in the properties in question in *Rubin* and *Weinstein* arose after January 19, 1981, so Executive Order 12,282 unblocked those assets. In contrast, Iran's interest in the ACMR arose in October 1977 when Iran executed the contracts with Cubic or at the latest by October 4, 1978 when Iran made a payment of approximately $12,900,000 on the contracts. *See MOD v. Cubic,* 29 F. Supp. 2d at 1170.

With these amendments, Judge Wardlaw has voted to deny the petition for rehearing en banc and Judge B. Fletcher has so recommended. Judge Fisher has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED. No further petitions for rehearing or for rehearing en banc may be filed.

OPINION

B. FLETCHER, Circuit Judge:

This case arises from Dariush Elahi's attempt to collect on a default judgment he holds against Iran. Elahi seeks to attach a $2.8 million judgment obtained in a contract dispute by the Iranian Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran. The district court allowed Elahi to attach the judgment, holding that the Ministry had waived its immunity from attachment by submitting to the jurisdiction of the court. We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we affirm the district court on the alternative ground that the judgment is subject to attachment under section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note).

BACKGROUND

The Wrongful Death Default Judgment

Dr. Cyrus Elahi was shot and killed as he left his apartment building in Paris, France, on October 23, 1990. *Elahi v. Islamic Republic of Iran,* 124 F. Supp. 2d 97, 103 (D.D.C. 2000). His brother, Dariush Elahi, brought a wrongful death action against the state of Iran and the Iranian Ministry of Information and Security ("MOIS") in the United States District Court for the District of Columbia, claiming Iranian agents assassinated his brother. *Id.* at 97, 100. Although

Iran and MOIS did not appear, the court heard testimony and read documentary evidence relating to the assassination;[1] this evidence satisfied the court that Iran and MOIS were liable for Dr. Elahi's death. *Id.* at 100-05, 114. It entered a default judgment against Iran and MOIS for $11.7 million in compensatory damages and punitive damages of $300 million. *Id.* at 115. It is this judgment that Elahi now seeks to satisfy by attaching the Cubic judgment.

The Contract Dispute between Cubic Defense Systems and the Iranian Ministry of Defense

In October 1977, the predecessor of the Iranian Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran ("MOD" or "the Ministry") entered into two contracts with an American defense contractor, now known as Cubic Defense Systems ("Cubic"), for the sale and service of an Air Combat Maneuvering Range ("ACMR") for use by the Iranian Air Force. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168, 1170 (S.D. Cal. 1998). Iran made partial payment on the ACMR, but never received it; following the Iranian Revolution of 1979, Cubic breached its contract with the Ministry and sold the ACMR elsewhere. *Id.*

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[1] Before a court may enter a default judgment against a foreign state, the Foreign Sovereign Immunities Act requires that the plaintiff "establish [] his claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. § 1608(e).

In an attempt to recover the ACMR or its payments, Iran filed a claim against Cubic with the Iran-U.S. Claims Tribunal in The Hague, which was dismissed for lack of jurisdiction.[2] *Id.* Subsequently, Iran requested arbitration before the International Chamber of Commerce ("ICC") in Zurich. *Id.* Having conducted a hearing at which both parties were represented, the ICC issued an award for MOD, ordering Cubic to pay $2.8 million in damages for breach of contract. *Id.* at 1171. The Ministry reduced this ICC award to a judgment ("the Cubic judgment") in the United States District Court for the Southern District of California. *Id.* at 1170-74.

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[2] The Tribunal is a tribunal of limited jurisdiction. It has jurisdiction only over claims brought against the United States or Iran and counterclaims arising from the same transactions. It may hear the following claims: (1) those brought by nationals of one state against the government of the other, and related counterclaims; (2) intergovernmental claims arising out of contracts for the purchase and sale of goods and services; and (3) intergovernmental claims regarding the interpretation of the Algiers Declarations. *See* Claims Settlement Declaration, Article II, *available at* http://www.iusct.org/claims-settlement.pdf; *see also* Case A/2, 1 Iran-U.S. C.T.R. 101, Dec. 1-A2-FT (Jan. 26, 1982).

The Iran-U.S. Claims Tribunal was created by mutual agreement of Iran and the United States in response to the Iranian hostage crisis and the freezing of Iranian assets by the United States. For more information about the Claims Tribunal and the Algiers Accords, *see* www.iusct.org/background-english.html.

Elahi's attempt to attach the Cubic judgment

On November 1, 2001, Elahi sought a lien against the Cubic judgment to satisfy partially his judgment against Iran. MOD filed a motion seeking a judicial determination that the Cubic judgment is immune from attachment by Elahi.[3] Denying the motion, the district court ruled that in waiving its immunity from jurisdiction by submitting to ICC arbitration and seeking confirmation of the arbitration award in district court, MOD had also waived its immunity from attachment of its property. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 236 F. Supp. 2d 1140, 1151-52 (S.D. Cal. 2002).

The Ministry appealed, and we affirmed the district court's holding that Elahi could attach the Cubic judgment, although we relied on different grounds. 385 F.3d 1206 (9th Cir. 2004) *vacated and remanded, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,*

[3] The Ministry filed a second motion seeking a determination that its judgment was immune from attachment by Stephen Flatow, another judgment creditor. The district court granted the Ministry's motion as to Flatow, and we affirmed. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206, 1217 (9th Cir. 2004) *reversed on other grounds as to Elahi by Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2006). Because Flatow did not appeal our decision to the Supreme Court, that judgment is not now before us.

546 U.S. 450 (2006) (per curiam). Relying on the structure and traditional interpretation of the Foreign Sovereign Immunities Act ("FSIA"), we held that the two immunities are separate and that MOD's waiver of jurisdictional immunity did not waive its attachment immunity. *Id.* at 1219. Nonetheless, we affirmed the district court's determination that Elahi could attach the Cubic judgment on the ground that MOD, as an agency of Iran engaged in commercial activity in the United States, fell within a FSIA exception to immunity allowing attachment of certain property connected to commercial activity. *See id.* at 1219; *see also* 28 U.S.C. § 1610(b).

The Ministry appealed to the United States Supreme Court, which granted certiorari on the limited question of whether MOD constituted a foreign state or an agency or instrumentality of a foreign state. *See Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* 546 U.S. 450, 126 S. Ct. 1193, 1194 (2006) (per curiam). Noting that FSIA offers broader immunity from attachment to a foreign state than to a foreign state's agencies and instrumentalities, the Court addressed the question of whether we had properly determined that the Ministry was an agency or instrumentality of Iran rather than the foreign state itself. *Id.* Finding that we had not, the Court remanded for reconsideration. *Id.* at 1195.

On remand, we requested two rounds of supplemental briefing and permitted the United States to appear as *amicus curiae*. As a result of this supplemental

briefing, two additional issues have emerged. First, the parties agree that in 2003, Elahi applied for and received payment of $2.3 million from the United States Treasury in partial satisfaction of his $11.7 million compensatory damages award against Iran. In receiving this payment, Elahi signed a declaration in which he relinquished some, but not all, of his rights to pursue the remainder of his default judgment against Iran. Specifically, he relinquished his right to punitive damages and his right to "execute against or attach property that is at issue in claims against the United States before an international tribunal." Office of Foreign Assets Control, Department of Treasury, *Payment to Persons Who Hold Certain Judgments Against Cuba or Iran,* 68 Fed. Reg. 8,077, 8,081 (Feb. 19, 2003); *see also* Victims of Trafficking and Violence Protection Act of 2000 ("Victims Protection Act"), Pub. L. No. 106-386, § 2002(a)(2)(D) (as amended by TRIA, § 201(c)(4)).

The Ministry and the United States both argue that by accepting this payment Elahi waived his right to attach the Cubic judgment. They contend that the Cubic judgment is currently "at issue" in Claim B/61 before the Iran-U.S. Claims Tribunal in The Hague in which Iran is attempting to recover, from the United States, *inter alia,* any value of the Cubic contracts in excess of the ICC award.

The second new issue is Elahi's contention that he may attach the Cubic judgment under TRIA § 201, which created an alternative avenue of attachment for certain judgment creditors of "terrorist part[ies]."

DISCUSSION

1. Elahi's purported waiver pursuant to his receipt of payment under the Victims Protection Act

In the fall of 2000, Congress directed the Secretary of the Treasury to make available to certain judgment creditors of Iran payments equal to the creditors' compensatory damages awards. Victims Protection Act, § 2002(a)(1). Under this statute, a person is eligible to receive payment for certain judgments against Iran for harms caused by state-sponsored terrorism. *Id.* § 2002(a)(2)(A)(i). Creditors who had filed suit on certain dates were eligible to receive payment, as were those who had received a final judgment by July 20, 2000. *Id.* §§ 2002(a)(2)(A)(i), (ii). Under the terms of the Victims Protection Act, Elahi was not eligible to receive payment.

In 2002, Congress amended the Victims Protection Act in several ways, three of which we highlight here. *See* TRIA § 201. First, it expanded the class of judgment creditors eligible to receive payment under the Victims Protection Act to include certain creditors who had filed suit against Iran before October 28, 2000 based on claims of state-sponsored terrorism. Victims Protection Act, § 2002(a)(2)(A)(ii) (as amended by TRIA § 201(c)(1)). This amendment made Elahi eligible to receive payment under the Victims Protection Act, as he had filed suit before October 28, 2000. *See Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d at 99-100 (noting entry of default judgment on August 14, 2000). Second, based on Congress's recognition of

the limited funds available to pay victims with judgments against Iran, the amended Victims Protection Act authorized the Secretary of the Treasury to make pro rata payments on compensatory damages awards. Victims Protection Act, § 2002(d)(1) (as amended by TRIA § 201(c)(4)). Finally, the statute requires a person who accepts a pro rata payment to relinquish certain rights, including the right to execute against or attach "property that is at issue in claims against the United States before an international tribunal" or that is the subject of awards by such tribunal. *Id.* § 2002(a)(2)(D) (as amended by TRIA § 201(c)(4)). Elahi concedes that he waived this right by accepting a pro rata payment under the Victims Protection Act.

Iran has brought a claim against the United States in the Iran-U.S. Claims Tribunal, Claim B/61, for damages based on the non-export of contracted-for goods, including the ACMR that was the subject of the Cubic contract, by United States companies who breached contracts following the Iranian Revolution. Related to the ACMR, Iran contends in its brief to the Claims Tribunal that the $2.8 million ICC award (which became the Cubic judgment) did not fully compensate it for Cubic's non-delivery of goods, and it seeks to recoup the difference from the United States. In that filing, Iran distinguished between the Cubic judgment and its claim before the Claims Tribunal, stating, "[t]he subject-matter of this case, at variance with the ICC action, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties." In other words, the Cubic judgment itself

already adjudicated in the ICC action is not "at issue" in Iran's claim that it has not been fully compensated by the United States.

We find this concession persuasive in distinguishing between the contractual obligations resolved through the Cubic judgment and the United States' obligations that will be addressed before the Claims Tribunal. In essence, Claim B/61 addresses what liability the United States incurred by failing to restore frozen Iranian assets, including the ACMR, as required under the Algiers Accords.[4] In contrast, the Cubic judgment had resolved Cubic's liability to Iran for non-delivery of the ACMR.

Nonetheless, Iran argues that the Cubic judgment is "at issue" before the Claims Tribunal because Iran has offered to offset from its demand against the United States in Tribunal Case B/61 any proceeds it receives from the Cubic judgment. This argument ignores Iran's presentation of its claims against Cubic to the ICC and its resulting judgment against Cubic. Having arbitrated this dispute before the ICC and secured a judgment against Cubic for its breach, Iran has fully adjudicated its claim against Cubic for non-delivery of the ACMR. Further, as noted *supra*, the

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[4] The main commitments of the Algiers Accords were (1) the release by Iran of 52 American hostages; and (2) the agreement by the United States to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." *See* General Declaration, General Principles, A at 1, *available at* http://www.iusct.org/general-declaration.pdf

Tribunal has no jurisdiction over claims against private parties, having jurisdiction only to hear counterclaims against such parties.[5] The question of whether Elahi can attach the Cubic judgment is a separate matter from Iran's claim against the United States. Iran's claim against Cubic has been addressed by a tribunal, resolved by the $2.8 million arbitration award against Cubic, and further reduced to a judgment in the Southern District of California.[6]

We hold that the Cubic judgment is not "at issue" before the Claims Tribunal and therefore that Elahi did not waive his right to attach the Cubic judgment by accepting a pro rata payment under the Victims Protection Act.[7]

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[5] *See supra* note 2.

[6] We note that four sister circuits have recently barred claims brought by a family who has accepted payment under the Victims Protection Act, as amended by TRIA, on the grounds that the properties they were attempting to attach were "at issue" before the Claims Tribunal. *See Hegna v. Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 (4th Cir. 2004). Each of those cases presented a factual situation, different from the one with which we are confronted, involving properties that had not yet been subject to any judicial determination of liability. Here, the Cubic judgment has been adjudicated and, as Iran concedes in its filing to the Claims Tribunal, is no longer at issue before the Tribunal.

[7] The majority and the dissent interpret differently the breadth of the term "at issue." The majority is guided by the plain meaning of "at issue," which is "under dispute" or "in question." Black's Law Dictionary (8th ed. 2004).

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2. Attachment under TRIA § 201(a)

On remand, Elahi advances the alternative claim that he may attach the Cubic judgment under TRIA § 201(a).[6] We agree that Congress created, in passing TRIA, a method of attachment for creditors such as Elahi who hold final judgments for harms caused by terrorism. *See* TRIA § 201(a) (incorporating by reference 28 U.S.C. § 1605(a)(7)).

Under TRIA, these creditors may attach "the blocked assets of [a] terrorist party." *Id.* Specifically, TRIA § 201(a) provides:

TRIA does not suggest a different conclusion. The dissent reads Congress's choice of the phrase "at issue" as cutting a broader swath than the phrase "the subject of" resolved claims. However, that distinction is untenable. It would embrace both properties as to which any dispute already has been resolved and those currently contested. "At issue" clearly means only those disputed before the Tribunal.

[6] Elahi refers to this claim as one for relief under 28 U.S.C. § 1610(f)(1)(A), as amended by TRIA. We find it clearer to refer to it as attachment under TRIA. TRIA's text does not expressly reinvigorate § 1610(f)(1)(A) from President Clinton's waiver, *see* Pres. Determ. No. 2001-03, 65 Fed. Reg. 66483 (Oct. 28, 2000), despite TRIA's legislative history showing an intent to "build[] upon and extend[] the principles in section 1610(f)(1) of the Foreign Sovereign Immunities Act," by "eliminat[ing] the effect of any Presidential waiver . . . purporting to bar or restrict enforcement of such judgments, thereby making clear that all such judgments are enforceable against any assets or property under any authorities referenced in Section 1610(f)(1)." H.R. Conf. Rep. No. 107-779 at 27 (Nov. 13, 2002), *reprinted in* 2002 U.S.C.C.A.N. 1430, 1434.

> (a) In general. – Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (alteration in original).

Elahi's claim for relief under TRIA § 201(a) turns on two factors: (1) whether Iran is a "terrorist party" under that statute and (2) whether the Cubic judgment is a "blocked asset." The first factor is easily answered. TRIA includes within its definition of "terrorist party" a foreign state "designated as a state sponsor of terrorism" by the Secretary of State. TRIA § 201(d)(4). Iran is subject to this definition, having been designated by Secretary of State George Shultz as a state sponsor of terrorism. *See* Secretarial Determ. 84-3, 49 Fed. Reg. 2836-02 (January 23, 1984).

We therefore turn to the second factor, whether the Cubic judgment fits within TRIA's definition of a blocked asset. TRIA defines "blocked asset" to mean "any asset seized or frozen by the United States . . .

under sections 202 and 203 of the International Emergency Economic Powers Act [("IEEPA")] (50 U.S.C. §§ 1701, 1702)." TRIA § 201(d)(2)(A). The IEEPA grants the President broad authority[9] to

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[9] 50 U.S.C. § 1702(a)(1) grants the President the following powers:

> (a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise–
>
> (A) investigate, regulate, or prohibit–
>
> (i) any transactions in foreign exchange,
>
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> (iii) the importing or exporting of currency or securities,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States;
>
> (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and
>
> (C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign

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regulate foreign assets when faced with "an unusual and extraordinary threat" related to a declared national emergency. 50 U.S.C. § 1701(b). Following the hostage crisis in 1979, President Carter exercised his authority under IEEPA to freeze Iranian assets in the United States:

> I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). He delegated to the Secretary of the Treasury his authority under IEEPA to carry out this Order. *Id.* Pursuant to that authority, the Treasury Department

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person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

issued the Iranian Assets Control Regulations, 45 Fed. Reg. 24,432 (Apr. 9 1980), codified at 31 C.F.R. part 535. Particularly relevant here is 31 C.F.R. § 535.201, which blocked the transfer of goods to Iran:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after [November 14, 1979] Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

31 C.F.R. § 535.201 (1980).

Following release of the hostages, the United States unblocked most Iranian assets and lifted the trade embargo. *See* Exec. Order Nos. 12,276-12,283, 46 Fed. Reg. 7913-7929 (Jan. 19, 1981); Iranian Assets Control Regulations, 46 Fed. Reg. 14330-14337 (Feb. 26, 1981) (codified at 31 C.F.R. pt. 535). However, military goods such as the ACMR remained blocked. *See* 22 U.S.C. §§ 2751 *et seq.*; Exec. Order No. 12,170, 44 Fed. Reg. 65729 (Nov. 14, 1979); Notice of President, 70 Fed. Reg. 69039 (Nov. 9, 2005); International Traffic in Arms Regulations, 22 C.F.R. §§ 120-30; OFFICE OF FOREIGN ASSETS CONTROL, DEP'T. OF TREAS., FOREIGN ASSETS CONTROL REGULATIONS FOR EXPORTERS AND IMPORTERS 23 (2007) ("Certain assets related to these claims remain blocked in the United States and consist mainly of military and dual-use property").

The Ministry argues that the Cubic judgment is not a blocked asset under TRIA because Executive Order 12,282 unblocked certain Iranian assets. In support of its argument, MOD cites two cases in which district courts found that TRIA did not permit the attachment of Iranian property because the assets at issue did not fall within TRIA's definition of "blocked assets." *See Bank of New York v. Rubin,* 2006 WL 633315 (S.D.N.Y. Mar. 15, 2006); *Weinstein v. Islamic Republic of Iran,* 299 F. Supp. 2d 63 (E.D.N.Y. 2004). However, the reasoning in those cases is inapplicable here. Iran's interest in the properties in question in *Rubin* and *Weinstein* arose after January 19, 1981, so Executive Order 12,282 unblocked those assets. In contrast, Iran's interest in the ACMR arose in October 1977 when Iran executed the contracts with Cubic or at the latest by October 4, 1978 when Iran made a payment of approximately $12,900,000 on the contracts. *See MOD v. Cubic,* 29 F. Supp. 2d at 1170.

In sum, we find that the Cubic judgment is a "blocked asset" under TRIA because it represents Iran's interest in an asset "seized or frozen by the United States . . . under sections 202 and 203 of the International Emergency Economic Powers Act." TRIA § 201(d)(2)(A). Because TRIA § 201(a) waives attachment immunity for such blocked assets, we hold that Elahi may attach the Cubic judgment.

3. MOD's status under FSIA

The Supreme Court's remand order asks us to determine the status of MOD. We answer that question although it is relevant only if our determination, either that the Cubic judgment is a blocked asset or that Elahi did not waive his right to attach the judgment under the Victims Protection Act, is in error.

All parties agree that, at a minimum, MOD is a "foreign state" for purposes of FSIA and that, as such, its assets would be subject to attachment under the narrow set of circumstances set forth in § 1610(a). The disputed question is whether MOD is an "agency or instrumentality" whose property is subject to attachment under the broader set of exceptions contained in § 1610(b). The answer turns on whether the entity, here the Ministry, is a "separate legal person." 28 U.S.C. § 1603(b).

In answering this question, some courts have created a "characteristics" test, asking whether, under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, and hold property in its own name. *See Hyatt Corp. v. Stanton,* 945 F. Supp. 675, 684 (S.D.N.Y. 1996); *Bowers v. Transportes Navieros Ecuadorianos,* 719 F. Supp. 166, 170 (S.D.N.Y. 1989). On the other hand, circuit courts have adopted a "core functions" test, asking whether the defendant is "an integral part of a foreign state's political structure" or, by contrast, "an entity whose structure and function is predominantly commercial." *Transaero,*

Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994) (internal quotation marks and alterations omitted); *see also Garb v. Republic of Poland,* 440 F.3d 579, 594 (2d Cir. 2006); *Roeder v. Islamic Republic of Iran,* 333 F.3d 228, 234 (D.C. Cir. 2003); *Magness v. Russian Fed'n,* 247 F.3d 609, 613 n.7 (5th Cir. 2001). The United States, in its briefing as *amicus curiae,* urges us to adopt the core functions test.

In *Transaero,* the D.C. Circuit considered whether the Bolivian Air Force constituted a part of the Bolivian state or an agency or instrumentality of that state for purposes of service of process under FSIA. Considering FSIA's purpose, the court noted that FSIA codified the "restrictive" approach to sovereign immunity in which immunity is "repealed" for commercial acts and "preserved" for "inherently sovereign or public acts." *Transaero,* 30 F.3d at 151; *accord Republic of Austria v. Altmann,* 541 U.S. 677, 690-91 (2004) (In passing FSIA, Congress's intent was to codify the "restrictive" theory of sovereign immunity, according to which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."). The D.C. Circuit found this "restrictive" approach to support a "core functions" test. Construing narrowly legislative history that would support applying the characteristics test, the D.C. Circuit pointed out that the characteristics test suffered a serious defect: Because "any nation may well find it convenient (as does ours) to

give powers of contract and litigation to entities that on any reasonable view must count as part of the state itself," almost any arm of the state would be considered instrumentalities. *Transaero,* 30 F.3d at 151 (noting that under the legislative history test, the United States Departments of State and Defense would count as instrumentalities). We agree. A foreign state is nothing more than the sum of its parts; in other words, like the United States, the state of Iran exists only through its head of state, its ministries, and the myriad administrative offices that collectively embody a sovereign state. More importantly, the foreign state can act only through these entities.

We add that it is illogical to distinguish between a "foreign state" and "agency and instrumentality" on the basis that the latter is a "separate legal person" while the former is not. A central purpose of FSIA was to specify the circumstances under which the federal courts could assert jurisdiction over a foreign state. Thus, the Act *presupposes* that a "foreign state" is capable of suing and being sued. Indeed, in numerous provisions, the Act explicitly anticipates legal actions brought by or against foreign states. *See* 28 U.S.C. § 1605 (enumerating circumstances in which "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States"); *id.* § 1608 (specifying the manner in which to serve process "upon a foreign state or a political subdivision"); *id.* § 1607 (limiting immunity from counterclaims in "any action brought by a foreign

state, or in which a foreign state intervenes"). If the touchstone of an "agency or instrumentality" is whether it can sue or be sued, then these provisions of FSIA become superfluous, thereby undermining the two-tiered scheme of immunity and liability that Congress sought to impose.

We adopt the "core functions" test as the appropriate benchmark for deciding whether an entity should be viewed as a "foreign state" or as an "agency or instrumentality." This analysis has been adopted by each of our sister circuits which has considered the issue, *see Garb,* 440 F.3d at 594; *Roeder,* 333 F.3d at 234; *Magness,* 247 F.3d at 613 n.7, and it is consistent with the purpose and structure of FSIA.

The question thus becomes whether MOD is inherently a part of the political state or a commercial actor. As the D.C. Circuit observed in *Transaero,* "the powers to declare and wage war" are so intimately connected to a state's sovereignty that "it is hard to see what would count as the 'foreign state' if its armed forces do not." 30 F.3d at 153. We find this reasoning persuasive, although we decline to adopt the D.C. Circuit's categorical rule that the armed forces will always be a part of the foreign state itself. *See id.* It is possible to imagine situations in which a state would "subcontract" its defense to paramilitary groups or mercenary forces that would not properly count as part of the state but rather as "separate legal person[s]." However, we adopt a strong presumption that the armed forces constitute a part of

the foreign state itself, and that presumption has not been rebutted here.

Here, Elahi has presented no evidence that MOD is a "separately constituted legal entity" distinct from the Iranian state. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 624 (1983).[10] He has not established that MOD is "primarily responsible for its own finances," that it is run as a "distinct economic enterprise," that it operates with "independence from close political control," or that it exhibits any of the traits – other than the capacity to sue and be sued – that the Court has identified as characteristic of a "separately constituted legal entity." *Id.* As such, Elahi has failed to overcome the presumption that MOD constitutes an inherent part of the state of Iran.

A. Attachment of the property of a foreign state.

Although MOD is a "foreign state," Elahi asserts that he may still attach the Cubic judgment under 28 U.S.C. § 1610(a)(7). Under this provision, Elahi must satisfy two conditions. First, his judgment against Iran must "relate [] to a claim" brought "against a

[10] We do not imply, by mentioning the *Bancec* factors, that a litigant could overcome the presumption that the armed forces constitute a part of the state through a showing that would satisfy the *Bancec* test for independence of an instrumentality. We expressly decline to discuss what evidentiary showing would suffice to overcome this presumption, since it is not before us on these facts.

foreign state for personal injury or death that was caused by an act of . . . extrajudicial killing." *See id.* (incorporating by reference 28 U.S.C. § 1605(a)(7)). Elahi asserts, and MOD has no choice but to concede, that he has satisfied this requirement. Second, the property in dispute, *i.e.*, the Cubic judgment, must be "property . . . used for a commercial activity in the United States." *Id.* § 1610(a). The parties dispute whether Elahi has satisfied this second requirement.

Section 1610(a) provides that, under certain circumstances, "the property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution . . . upon a judgment entered by a court of the United States." 28 U.S.C. § 1610(a). Focusing on whether Iran's contract with Cubic constituted commercial activity, Elahi argues that the Cubic judgment was "used for commercial activity in the United States" because it "arose out of MOD's commercial activity." This analysis begs the question. Even assuming the Cubic contract constituted a commercial contract for sale of military goods and services, we are still faced with the question posed by § 1610(a) on the use to which MOD has put the judgment. The source of the property is not determinative and "the mere fact that the property has a nexus or connection to a commercial activity in the United States is insufficient." *Af-Cap Inc. v. Chevron Overseas Ltd.*, 475 F.3d 1080, 1094 (9th Cir. 2007) (internal quotation marks omitted); *accord Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d

240, 253 (5th Cir. 2002); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36-37 (3d Cir. 1985) (rejecting an argument that property used to house the Libyan ambassador to the United Nations was subject to attachment under § 1610(a) because the property was acquired in a commercial transaction and reasoning that if "acquisition of property in a particular commercial transaction or act indelibly stamped the property as used for commercial activity, even foreign embassies and chancelleries would be subject to execution. Plainly Congress did not intend a result so inconsistent with recognized principles of international law.").

To satisfy § 1610(a), MOD must have used the Cubic judgment for a commercial activity in the United States, and this it has not done. We have recently stated that "property is 'used for a commercial activity in the United States' when it is put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to a commercial activity." *Af-Cap Inc.*, 475 F.3d at 1091 (emphasis in original). Cautioning that "FSIA does not contemplate a strained analysis of the words 'used for' and 'commercial activity,'" we instructed courts to "consider[] the use of the property in question in a straightforward manner." *Id.* The Ministry has not used the Cubic judgment as security on a loan, as payment for goods, or in any other commercial activity. Instead, Iran intends to send the proceeds back to Iran for assimilation into MOD's general budget. Because repatriation

into a ministry's budget does not constitute commercial activity, we hold that the Cubic judgment is not subject to attachment under § 1610(a).

CONCLUSION

We conclude that although Elahi may not attach the Cubic judgment under § 1610(a), he may do so under TRIA.

The judgment of the district court is **AFFIRMED**.

FISHER, Circuit Judge, dissenting:

When Dariush Elahi applied for and accepted $2.3 million from the United States Treasury under the Terrorism Risk Insurance Act of 2002 (TRIA), he relinquished the right to attach property at issue in claims against the United States before an international tribunal. *See* Pub. L. No. 107-297, § 201(d)(5)(B), 116 Stat. 2322, 2339. Iran's Ministry of Defense (MOD), and the United States as amicus curiae, argue that Elahi has relinquished his right to attach the Cubic judgment because it is "at issue" in Iran's Case B/61 before the United States-Iran Claims Tribunal.[1] I agree.

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[1] Neither party disputes that the United States-Iran Claims Tribunal is an "international tribunal" for purposes of TRIA's relinquishment provision. *See Hegna v. Islamic Republic of Iran*, 402 F.3d 97, 99 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*,

(Continued on following page)

Case B/61 involves the status and disposition of Iranian military property and assets situated in the United States. One of the pieces of military equipment in dispute in Case B/61 is the Air Combat Maneuvering Range (ACMR), which MOD purchased from Cubic on October 3, 1977. Because Iran has already recovered $2.8 million from Cubic for damages arising out of the 1977 Cubic contract, the United States is entitled to use the Cubic judgment as a setoff against any award in Case B/61.

Although the Cubic judgment will affect the amount of money damages the United States will have to pay, the majority concludes that the Cubic judgment is not "at issue" in Case B/61 and can be attached by Elahi. As a result, the government – if found liable in Case B/61 – will no longer have the benefit of the $2.8 million Cubic judgment that otherwise would be deducted by offset. Because the majority's interpretation of "at issue" contradicts the term's plain meaning and Congress' intent in passing TRIA, I respectfully dissent.

I. TRIA's Relinquishment Provision

By enacting TRIA in 2002, Congress expanded the class of judgment creditors eligible to receive payments from the United States Treasury for judgments awarded against "terrorist part[ies]." TRIA

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380 F.3d 1000, 1008-09 (7th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004).

§ 201(a). Sponsors expressed the hope that TRIA would provide American victims previously denied compensation, such as Elahi, with "some measure of justice." 148 Cong. Rec. S11524-01, 11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin).

However, TRIA's justice comes at a cost. Those who receive partial compensation must agree to relinquish the right to execute or attach property "that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal," TRIA § 201(d)(5)(B), and recipients must sign an agreement stating:

> I hereby relinquish . . . all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.
>
> I understand that the relinquishment that I make in the event of any pro rata distribution is irrevocable once the payment is credited to the bank account I have identified in this application.

See Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran, 68 Fed. Reg. 8077-02, 8081 (Feb. 19, 2003).

When Elahi accepted TRIA funds in April 2003, he knew that he risked waiving the right to attach the Cubic judgment. As early as 2002 MOD argued before the district court that the Cubic judgment "is at issue in Case *B/61* between the United States and

Iran in the Hague." *See Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 236 F. Supp. 2d 1140, 1146 (S.D. Cal. 2002) (quoting MOD's briefing). Although I am deeply sympathetic to Elahi and his family for their personal loss, relinquishment of the right to attach the Cubic judgment is part of the bargain Elahi struck by accepting funds from the United States treasury.

II. Plain Meaning of "At Issue"

This case presents a question of statutory interpretation. As such, the first step is determining "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). For our purposes, the language at issue is "at issue."

When determining the plain meaning of language, we may consult dictionary definitions. *See AfCap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088 (9th Cir. 2007). Black's Law Dictionary defines "at issue" as "[t]aking opposite sides; under dispute; in question." Black's Law Dictionary (8th ed. 2004). Similarly, the American Heritage Dictionary of the English Language (4th ed. 2000), defines "at issue" as "[i]n question; in dispute." It is evident from these definitions that Congress selected a term with a relatively broad meaning. *See Hegna v. Islamic*

Republic of Iran, 376 F.3d 485, 492 (5th Cir. 2004) (rejecting narrow interpretation of "at issue").[2]

The Cubic judgment is at issue before the Claims Tribunal because – under any scenario – the Tribunal must determine the effect of the judgment on the amount of liability owed by the United States. Iran has voluntarily pledged to offset the $2.8 million Cubic judgment against any award it wins against the United States in Case B/61. If Iran keeps its promise, that will affect the Claims Tribunal's determination of the amount of damages the United States will have to pay Iran.

Significantly, even if Iran were to renege on its promise, the Cubic judgment would be at issue because the United States could then claim an entitlement to a setoff. Under Claims Tribunal precedent, a defending party may request a reduction of damages where the setoff arises from the same transaction or contract as the underlying claim. *See Computer Sciences Corp. v. Gov't of the Islamic Republic of Iran*, 10 Iran-U.S.C.T.R. 269 (Chamber 1 Apr. 16, 1986). The $2.8 million Cubic judgment – like Iran's underlying

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[2] Like the majority, my analysis is guided by the plain meaning of "at issue." *See* Op. at 8659 n.7. We part ways because the majority limits the term "property . . . at issue" to property that is the subject of a merits determination before the Claims Tribunal. *See id.* However, an issue is "in question" or "at issue" in a dispute even if it is not the subject of a merits determination. The effect of the Cubic judgment on the financial liability of the United States will be raised and adjudicated; that is sufficient to put the property "in question."

claim – arises from the 1977 contract between Iran and Cubic for the ACMR equipment. Moreover, the United States could also argue that offset is mandated by the doctrine of judicial estoppel. *See Raygo Wagner Equip. Co. v. Iran Express Terminal Corp.*, 2 Iran-U.S.C.T.R. 141 (Chamber 3 Mar. 18, 1983) (finding Iran judicially estopped from asserting that Claims Tribunal lacked jurisdiction where it forwarded inconsistent position before American court).

Because the Claims Tribunal will have to consider the effect of the judgment on any award levied against the United States government, I must conclude that the Cubic judgment is "property that is at issue" before the Claims Tribunal.

III. Reading the Statute as a Whole

My conclusion is reinforced by reading TRIA as a whole. Because statutory provisions are not written in a vacuum, we should also examine TRIA's purpose and various provisions to understand the meaning of "at issue." *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc). There is no legislative history to guide us, but it is evident from the plain text of § 201 that TRIA's relinquishment provision was intended to prevent victims of terrorism who accept money from the federal treasury from attaching, executing on or making claims against property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals.

Acting on this understanding, other circuits have rebuffed attempts by applicants to attach Iranian property that might become the subject of an award against the United States before the Claims Tribunal. In *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004), the Fourth Circuit held that a family that accepted payment under TRIA relinquished its right to attach former Iranian diplomatic properties located in Bethesda, Maryland. The court held that such properties were "at issue" before the Claims Tribunal because Iran filed claims against the United States alleging that the federal government unlawfully "fail[ed] to grant Iran custody of its diplomatic and consular properties in the United States." *Id.* (citation and internal quotation marks omitted). Because Iran's claim remained pending before the Claims Tribunal, the court concluded that "it would appear rather straight-forward that the Bethesda properties fall within the contours of the Hegnas' relinquishment." *Id.* In short, had the Hegnas succeeded in effecting the sale of the properties to satisfy the balance of their judgment against Iran, the United States would then have had to compensate Iran for the value of those properties (if found liable to Iran), in effect covering the funds paid to the Hegnas through their attachment. This is the very result Congress intended to avoid through the relinquishment proviso.

Although Elahi's attachment involves cash rather than buildings, adherence to legislative intent results in the same outcome. Having already received TRIA

funds from the United States treasury, Elahi should not be permitted to attach property that might otherwise be used to satisfy a judgment against the United States. As in *Hegna*, the only way to effectuate congressional intent is to prohibit Elahi from doing so.

IV. Iran's "Concession"

Although the majority's interpretation of "at issue" contradicts plain meaning and congressional intent, the majority is "persua[ded]" to hold in favor of Elahi because Iran "conceded" in briefing to the Claims Tribunal that the Cubic judgment and Case B/61 do not share identicality of subject matter. Op. at 8657-58. There are convincing reasons to be persuaded otherwise.

In its briefing to the Claims Tribunal, Iran argued against giving res judicata effect to the ICC's adjudication of its claim against Cubic because:

> [the ICC's] case and the present one lack three identities (identity of object, identity of parties, and identity of subject matter) required for that purpose. The object of this litigation, unlike that in the ICC lawsuit, is the United States' obligation under the Algiers Declarations to arrange for the transfer of the items to Iran. The opposing party in this Case is, obviously not a U.S. private company, but the United States' Government. The subject-matter of this Case, at variance with the ICC action, is the losses

> suffered by Iran as a result of the United States' non-export of Iranian properties.

However, Iran's argument concerned the equitable doctrine of res judicata and therefore has little bearing on this court's exercise in statutory interpretation. Even if Iran were correct that the subject matter of Case B/61 is at variance with the ICC arbitration, it does not follow that the Cubic judgment is not at issue in Case B/61. "At issue" is not synonymous with identity of subject matter, a distinction that Congress clearly understood when it drafted TRIA.

TRIA's relinquishment provision prohibits applicants from attaching two different types of property: (1) property that is "*the subject of*" *resolved* claims before an international tribunal; and (2) property that is "*at issue*" when claims remain *pending*."[T]he use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Sec. & Exch. Comm'n v. McCarthy,* 322 F.3d 650, 656 (9th Cir. 2003). By using the conceptually broader term "at issue," it is evident that Congress did not intend to limit the relinquishment provision strictly to property that is *the subject of* a pending claim before the Claims Tribunal.

Thus, the majority's rationale that the Cubic judgment is not at issue because Case B/61 addresses the federal government's liability for failing to restore frozen assets (including the ACMR), whereas the Cubic judgment reflects Cubic's liability for the non-delivery

of the ACMR, is wide of the mark. *See* Op. at 8658. The majority's observation is, of course, accurate but not dispositive of the relinquishment analysis. Because MOD's claim against the United States is still pending, the relevant question is not whether the Cubic judgment and Case B/61 share the same parties, causes of action or even the same "subject," but whether the Cubic judgment is "at issue" or "in question" in Case B/61. Because the Claims Tribunal will have to consider the impact of the Cubic judgment on the amount of liability owed by the United States, the answer to that question is yes.

By relying so heavily on Iran's argument – made in a different context to another tribunal – the majority rests its analysis on a shaky foundation. TRIA itself – its text and purpose – offers much firmer ground for an exercise in statutory interpretation. Adherence to established doctrines of statutory construction leads to the conclusion that Elahi relinquished his right to attach the Cubic judgment. I therefore respectfully dissent.

THE MINISTRY OF DEFENSE AND
SUPPORT FOR THE ARMED FORCES
OF THE ISLAMIC REPUBLIC OF IRAN,
as Successor in Interest to the Ministry of War
of the Government of Iran, Plaintiff-Appellee,
v.
CUBIC DEFENSE SYSTEMS, INC.,
as Successor in Interest to Cubic International
Sales Corporation, Defendant,
v.
Stephen M. Flatow,
Plaintiff-intervenor-Appellant,
and
Dariush Elahi, Plaintiff-intervenor.

The Ministry of Defense and Support for the
Armed Forces of the Islamic Republic of Iran,
as Successor in Interest to the Ministry of War
of the Government of Iran, Plaintiff-Appellee,
v.
Cubic Defense Systems, Inc., as Successor in Interest
to Cubic International Sales Corporation, Defendant,
v.
Stephen M. Flatow,
Plaintiff-intervenor-Appellant,
and
Dariush Elahi, Plaintiff-intervenor.

The Ministry of Defense and Support for the
Armed Forces of the Islamic Republic of Iran,
as Successor in Interest to the Ministry of War
of the Government of Iran, Plaintiff-Appellant,
v.
Cubic Defense Systems, Inc., as Successor in Interest
to Cubic International Sales Corporation, Defendant,

v.

Stephen M. Flatow, Plaintiff-intervenor,
and
Dariush Elahi, Plaintiff-intervenor-Appellee.

Nos. 99-56498, 02-57043, 03-55015.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

June 22, 2004, Argued and Submitted,
San Francisco, California
October 7, 2004, Filed

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JUDGES: Before: Betty B. Fletcher, Kim McLane Wardlaw, and Raymond C. Fisher, Circuit Judges.

OPINION BY: BETTY B. FLETCHER

OPINION: B. FLETCHER, Circuit Judge:

These consolidated appeals arise from attempts by Stephen Flatow ("Flatow") and Dariush Elahi

("Elahi") to collect on default judgments they obtained against the Islamic Republic of Iran ("Iran") in the United States District Court for the District of Columbia. That court found Iran liable for the terrorist acts that resulted in the deaths of Flatow's daughter and Elahi's brother. In both cases, the district court assessed substantial compensatory and punitive damages against Iran.

In the underlying case, Iran's Ministry of Defense ("MOD") successfully petitioned the District Court for the Southern District of California to confirm an arbitration award issued in its favor by the International Chamber of Commerce ("ICC"). The $2.8 million award had been issued against a supplier of military equipment, Cubic Defense Systems, Inc. ("Cubic"), and related to a claimed breach of contract by Cubic in providing military hardware to MOD. Shortly after the district court confirmed the arbitration award, Flatow moved to intervene in the case. The district court denied Flatow's motion, and that decision is the subject of the appeal in case No. 99-56498. Later, both Flatow and Elahi moved to attach MOD's judgment against Cubic. In turn, MOD moved the district court for a determination that its judgment against Cubic was immune from attachment. The district court granted MOD's motion with respect to Flatow, but denied it with respect to Elahi. Flatow and MOD appeal those determinations in case Nos. 02-57043 and 03-55015, respectively.

JURISDICTION

The denial of a motion to intervene as of right is an appealable final order. *Leisnoi, Inc. v. United States*, 313 F.3d 1181, 1184 (9th Cir. 2002). In addition, district court orders entered after the entry of judgment are generally reviewable by a separate appeal. *See United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1184-85 (9th Cir. 1995). We therefore have jurisdiction over the consolidated appeals pursuant to 28 U.S.C. § 1291.

BACKGROUND

The Flatow Default Judgment

On April 10, 1995, Alisa Michelle Flatow, an American college student living in Israel, died of injuries she sustained as a result of a suicide bombing in the Gaza Strip. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 7-8 (D. D.C. 1998). Her father, Stephen Flatow, later brought suit against Iran, its Ministry of Information and Security ("MOIS"), and various Iranian officials in the District Court for the District of Columbia.[1] The Iranian government and

[1] Flatow sued under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1241 (1996), and a separate provision known as the "Flatow Amendment," 1997 Omnibus Consolidated Appropriations Act, Pub.L. 104-208, Div. A, Title I § 101(c), 110 Stat. 3009-172, *reprinted at* 28 U.S.C.A. § 1605 note (West 2003). These provisions purported to provide both a cause of action and a forum to adjudicate claims arising from state-sponsored terrorist attacks which

(Continued on following page)

its officials did not enter an appearance, and the district court entered a default judgment against them on March 11, 1998. *Id.* at 6. Prior to entering judgment, however, the court conducted an evidentiary hearing and set forth detailed findings of fact and conclusions of law. The court found that Flatow had established his claim to relief in that the Iranian government and the other defendants had sponsored terrorist acts and performed acts which caused the death of Flatow's daughter.[2] *Id.* at 9-10. The district court also held that it had subject-matter jurisdiction over the action and personal jurisdiction over the defendants. *Id.* at 34. The judgment against the Iranian defendants was for $20,000,000 in compensatory damages and $250,000,000 in punitive damages. *Id.* at 32, 34.

The Elahi Default Judgment

On October 23, 1990, Dr. Cyrus Elahi was assassinated in Paris, France. *See Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 103 (D. D.C. 2000). Dr.

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resulted in the death or injury of a United States citizen. *See generally Flatow*, 999 F. Supp. at 12-13. AEDPA also created an exception to the sovereign immunity of foreign states designated as terrorist states in cases in which the foreign state commits a terrorist act or provides support to others who commit such an act. *See id.*; 28 U.S.C. § 1605(a)(7).

[2] Under 28 U.S.C. § 1608(e), the district court cannot enter a default judgment against a foreign state until the claimant "establishes his claim or right to relief by evidence satisfactory to the court."

Elahi was a naturalized United States citizen and an important official in an Iranian opposition group working from France. *Id.* at 102-03. French authorities arrested a number of Iranian nationals, and determined that the assassination had been orchestrated by the Iranian government through MOIS. *Id.* at 104. In 2000, Dr. Elahi's brother, Dariush Elahi, filed suit against Iran and MOIS in the District Court for the District of Columbia. As with the Flatow case, the Iranian government did not enter an appearance with that court, and the court therefore entered a default judgment in favor of Elahi in December 20, 2000. *Id.* at 99-100. Before entering j dgment, the district court issued findings of fact and conclusions of law. The judgment against Iran was for compensatory damages in the amount of $11,740,035, and punitive damages of $300,000,000. *Id.* at 115.

The Case Against Cubic Defense Systems

In October 1977, MOD's predecessor entered into a pair of contracts with Cubic, a California-based defense firm, relating to the sale and servicing of an Air Combat Maneuvering Range ("ACMR") for use by the Iranian Air Force. *Ministry of Def. v. Cubic Def. Systems, Inc.*, 29 F. Supp. 2d 1168, 1170 (S.D. Cal. 1998). Following the Iranian revolution of 1979, the delivery of the ACMR did not take place for reasons that the two parties dispute. *See id.* In September 1991, and pursuant to the terms of the contracts, MOD filed a request for arbitration with the ICC in Zurich, Switzerland. *Id.* After submissions from both

MOD and Cubic, the ICC ruled in favor of MOD and issued a Final Award requiring Cubic to pay MOD $2.8 million. *Id.* at 1171.

In June 1998, MOD filed a petition in the District Court for the Southern District of California to confirm the award entered by the ICC pursuant to the New York Convention.[3] *Id.* at 1170. After reviewing Cubic's arguments in opposition, the district court granted MOD's petition and confirmed the ICC Award on December 7, 1998. *Id.* at 1174.[4] Both Cubic and MOD took cross appeals of the district court's decision, and those appeals remain pending.

On February 1, 1999, Flatow filed a Motion for Leave to Intervene in the district court. Flatow pointed out that he had obtained a Summons in Garnishment directed at Cubic from the District Court for the Eastern District of Virginia, and that he expected to receive an Order of Condemnation from that court as to MOD's cause of action in the Cubic case. The district court denied Flatow's motion on April 6, 1999, finding that, under Rule 24(a)(2) of the Federal Rules of Civil Procedure, the motion was

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[3] "The New York Convention" refers to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, *opened for signature* June 19, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *reprinted in* 9 U.S.C.A. § 201 note (West 2003).

[4] Throughout this opinion, we will refer to this $2.8 million judgment entered against Cubic and on behalf of MOD as the "Cubic judgment."

untimely and Flatow had failed to establish "an interest relating to the property or transaction which is the subject matter of the litigation." On June 10, 1999, Flatow filed a motion for reconsideration of the district court's decision, but the district court denied the motion on August 10, 1999. Flatow filed a notice of appeal from the denial of his motion for reconsideration on September 9, 1999. We heard oral arguments on this appeal (99-56498) on December 6, 2001, but vacated submission of the case pending the resolution of a motion by MOD to dismiss the appeal. MOD claimed that Flatow's acceptance of payments under the Victims of Trafficking and Violence Protection Act of 2000 rendered him unable to collect against the Cubic judgment. We directed that MOD's motion to dismiss be filed in the district court and stayed the intervention appeal pending that court's decision.

At the same time that Flatow's motion to intervene was being rejected, Flatow filed a notice of lien with the district court on April 27, 1999. The notice indicated that Flatow had registered his default judgment against Iran in the Southern District of California, and claimed that any monies to be distributed as part of the Cubic judgment should be directed to him. A similar notice of lien was filed by Elahi on November 1, 2001.

On September 13, 2002, MOD filed motions seeking a judicial determination that its judgment against Cubic Defense Systems was immune from attachment by both Flatow and Elahi. The district

court heard oral argument on the motion on October 28, 2002, and rendered its decision on November 26, 2002. The district court granted MOD's motion as to Flatow and ordered the striking of Flatow's notice of lien, but it denied the motion as to Elahi, finding that MOD's judgment was not immune from attachment by Elahi. *Ministry of Def. v. Cubic Def. Systems Inc.*, 236 F. Supp. 2d 1140, 1152 (S.D. Cal. 2002) (hereinafter "District Court Order"). Both Flatow and MOD filed timely appeals.

DISCUSSION

I. The Denial of Flatow's Motion to Intervene

We examine first the district court's decision to deny Flatow's motion to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure in the underlying litigation between MOD and Cubic. Ordinarily, we review the denial of a motion to intervene de novo. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1082 (9th Cir. 2003). However, Flatow's appeal is not from the denial of the motion to intervene itself but from the denial of his motion for reconsideration of that decision. We therefore review for an abuse of discretion. *Smith v. Pac. Properties Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004).

We have previously explained that an applicant for intervention as of right under Rule 24(a)(2) must comply with the following four requirements:

> (1) the application for intervention must be timely; (2) the applicant must have a

> "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 817 (9th Cir. 2001). In this case, the district court denied Flatow's motion for leave to intervene on the grounds that the motion was untimely and that Flatow had failed to establish an interest relating to the property or transaction which is the subject matter of litigation.

We conclude that the district court did not abuse its discretion in refusing to reconsider its determination regarding Flatow's motion to intervene. Flatow claimed to meet the "significantly protectable interest" prong of the Rule 24(a)(2) test because he is a judgment creditor of MOD and therefore has an interest in ensuring he is able to collect on his judgment. Our court has already rejected this line of argument, however, in a decision issued after the briefs were filed in these appeals. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 920-21 (9th Cir. 2004). In *Alisal Water*, we explained that the mere interest in the prospective collectability of a debt is insufficient to satisfy the requirements of Rule 24(a)(2), unless that interest is related to the

underlying subject matter of the action. In this case, Flatow asserts no interest related to the underlying dispute between MOD and Cubic. Therefore, under *Alisal Water*, the district court properly rejected Flatow's attempt to intervene as of right in the underlying litigation.[5]

We affirm the district court's denial of Flatow's motion for reconsideration.

II. Flatow's Waiver of Claims Against Iran

MOD argues that Flatow has waived any claim that he may have had on the Cubic judgment through his acceptance of payments under section 2002 of the Victims of Trafficking and Violence Protection Act of 2000, Pub.L. No. 106-386, 114 Stat. 1464 ("Victims Protection Act"). The district court agreed with MOD and ordered the district court clerk to strike the lien that Flatow had placed on the Cubic judgment. District Court Order at 1152. Because the district court's decision presents purely legal questions, we review it de novo. *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004).

In enacting section 2002 of the Victims Protection Act, Congress created a mechanism through which individuals holding judgments against Iran or Cuba,

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[5] Because we affirm the district court's decision on this ground, we need not consider whether Flatow's motion to intervene was timely, and we decline to do so.

based on those nations' sponsorship of terrorist activity, could collect damages from a special fund established by the United States government. Claimants had to choose between either (a) recovering 110 percent of the compensatory damages awarded in the judgment in return for relinquishing any rights as to compensatory or punitive damages, or (b) recovering 100 percent of the compensatory damages and relinquishing all rights as to compensatory damages but relinquishing only certain rights as to the punitive damages portion of their judgment. Victims Protection Act sections 2002(a)(1) and (a)(2). Claimants choosing option (b) would be required to relinquish "all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to section 1610(f)(1)(A) of title 28, United States Code." Victims Protection Act section 2002(a)(2)(D).

Neither Flatow nor MOD disputes that Flatow opted for option (b) under the Victims Protection Act and that he therefore received a payment of 100 percent of the compensatory damages he was awarded in the default judgment issued by the District Court for the District of Columbia. What the parties do dispute is the breadth of the relinquishment provision quoted above and whether it covers the judgment MOD obtained against Cubic. MOD does not argue that the Cubic judgment is either at issue in claims before an international tribunal or the subject of awards rendered by such a tribunal.

Instead, MOD claims that the Cubic judgment is "property . . . that is subject to [28 U.S.C. § 1610(f)(1)(A)]." Determining the viability of MOD's claim requires us to follow a labyrinthine path through several statutes and regulations.

Title 28 U.S.C. § 1610(f)(1)(A) provides that

> Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

MOD argues that the Cubic judgment is subject to this provision because it is "property with respect to which financial transactions are prohibited or regulated pursuant to . . . sections 202 and 203 of the International Emergency Economic Powers Act

[("IEEPA")]" or regulations issued pursuant to those sections.

We therefore turn to sections 202 and 203 of the IEEPA, which generally provide authority for the President to regulate financial transactions and other transfers of property involving a foreign country when he declares a national emergency with respect to any "unusual and extraordinary threat" emanating from outside the United States. *See* IEEPA section 202, 50 U.S.C. § 1701. As relevant here, section 203 of the IEEPA provides that "the President may, under such regulations as he may prescribe . . . regulate . . . any transactions involving[] any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1).[6] The President has exercised

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[6] The full language of the relevant portion of section 203 is as follows:

> At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise –
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> (A) investigate, regulate, or prohibit –
>
> (i) any transactions in foreign exchange,
>
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> (iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;

(Continued on following page)

this authority with respect to Iran since 1979, when President Carter declared a national emergency with respect to that country in response to the taking of hostages in the United States Embassy in Tehran. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). Pursuant to that and subsequent declarations,[7] the President – through the Department of the Treasury – has established two regulatory schemes relating to transactions involving Iran: the Iranian Assets Control Regulations ("IACR"), 31 C.F.R. pt. 535 (2003), which regulate transactions involving Iranian property subject to United States jurisdiction, and the Iranian Transactions Regulations ("ITR"), 31 C.F.R. pt. 560, which regulate trade and financial transactions between United States entities and

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> (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1)(A) and (B).

[7] Since 1979, the President has issued several declarations continuing the state of emergency with respect to Iran. *See, e.g.*, Continuation of Iran Emergency, 66 Fed. Reg. 56,966 (Nov. 8, 2001); Continuation of Iran Emergency, 62 Fed. Reg. 51,591 (Sept. 30, 1997); Continuation of Iran Emergency, 55 Fed. Reg. 47,453 (Nov. 9, 1990).

Iran.[8] *See Flatow v. Islamic Republic of Iran*, 353 U.S. App. D.C. 275, 305 F.3d 1249, 1255 (D.C. Cir. 2002). Only the IACR are relevant to our analysis of this aspect of the case.

Title 31 C.F.R. § 535.201 provides that

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after [November 14, 1979] Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

Section 535.311 defines "property" for purposes of § 535.201 to include "judgments." The combination of these regulations makes clear that the Cubic judgment is property regulated by the IACR and that the IACR have been enacted pursuant to sections 202 and 203 of IEEPA. This means, in turn, that the Cubic judgment is "subject to" 28 U.S.C. § 1610(f)(1)(A), as provided for in the Victims Protection Act, and that Flatow therefore relinquished all rights to execute against or attach that judgment when he received payments under the Act.

Flatow's arguments against this conclusion are unavailing. Flatow first claims that reading the

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[8] Both regulatory schemes are administered by the Office of Foreign Assets Control (OFAC), an entity within the Department of the Treasury.

relevant statutes and regulations to preclude attachment of the Cubic judgment would create a conflict between the Victims Protection Act and the duties embodied in the New York Convention to enforce foreign arbitral awards. The New York Convention, however, has been fully enforced in this case; the district court has confirmed the ICC award obtained by MOD against Cubic. *See Ministry of Def. v. Cubic Def. Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998). The award has, in essence, been transformed into a judgment of a federal court, and the New York Convention is now irrelevant to whether that judgment can be attached by a third-party.[9] *Cf. Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 n. 2 (2d Cir. 1987) ("The [New York] Convention does not apply to the enforcement of judgments that confirm foreign arbitration awards.").

Flatow's second argument is that the Cubic judgment is not currently "regulated" by the IEEPA. Flatow points out that 31 C.F.R. § 535.579(a)(2) provides that "transactions involving property in which Iran or an Iranian entity has an interest are authorized where . . . the interest in the property of Iran or an Iranian entity . . . arises after January 19, 1981." This provision is one of several general licenses which authorize particular categories of transactions involving Iranian property. *See* 31 C.F.R.

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[9] The New York Convention remains relevant, however, to the original dispute between MOD and Cubic, which is still on appeal.

§§ 535.504-535.580; *see also* 31 C.F.R. § 501.801(a) (defining general licenses). Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree. *See* section III. D., *infra*. Flatow further contends, however, that § 535.579 "deregulates" the Cubic judgment, so as to render it property not subject to regulation under IEEPA. With this proposition we cannot agree. As noted earlier, 31 C.F.R. § 535.201 prohibits any dealings in Iranian property subject to the jurisdiction of the United States "except as authorized." Section 535.579 then "authorize[s]" transactions involving certain property, including the Cubic judgment. The fact that a range of conduct is authorized or permitted does not mean that it is not regulated; to the contrary, the fact that § 535.579 purports to *authorize* transactions related to the Cubic judgment reinforces the notion that the judgment is property regulated by the Iranian regulations and IEEPA. *See Flatow*, 305 F.3d at 1255 ("The fact that a transaction is authorized by an OFAC license confirms that it is 'regulated' by IEEPA and by regulations or licenses issued pursuant thereto."). We note, for instance, that any transactions involving the Cubic judgment remain subject to the record-keeping requirements set out at 31 C.F.R. § 501.601.[10]

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[10] 31 C.F.R. § 501.601 provides:

> Except as otherwise provided, every person engaging in any transaction subject to the provisions of this chapter [which includes both the IACR and ITR] shall

(Continued on following page)

Moreover, our reading of the relevant statutes and regulations is the one adopted by OFAC,[11] which is charged with administering the Iranian regulations, and OFAC's interpretation is entitled to deference. *See Consarc Corp. v. United States Treasury Dep't, Office of Foreign Assets Control*, 315 U.S. App. D.C. 201, 71 F.3d 909, 914 (D.C. Cir. 1995) (holding that OFAC is entitled to *Chevron* deference in its interpretations of IEEPA). For these reasons, we reject Flatow's contention that § 535.579 or any other general or specific licenses render the Cubic judgment not "regulated" by IEEPA.

Flatow's final argument is that our reading of the statutes and regulations would lead to an absurd result. *Cf. United States v. Martinez-Martinez*, 369 F.3d 1076, 1085 (9th Cir. 2004) ("[A] statute must not be construed in a way that produces absurd results. . . ."). Because virtually all Iranian property in the United States is regulated under IEEPA, Flatow

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keep a full and accurate record of each such transaction engaged in, *regardless of whether such transaction is effected pursuant to license or otherwise*, and such record shall be available for examination for at least 5 years after the date of such transaction.

(emphasis added)

[11] As we explain more fully below, the notice issued by OFAC to implement the payment scheme set up by the Victims Protection Act warned that "virtually all Iranian . . . property within the jurisdiction of the United States is 'property with respect to which financial transactions are prohibited or regulated pursuant to' IEEPA. . . ." 65 Fed.Reg. 70,382, 70,384 (Nov. 22, 2000).

argues that he may never be able to collect on the punitive portion of his default judgment. Flatow would therefore have given up a payment of 10 percent of his compensatory damages under the Victims Protection Act for a nonexistent possibility. We recognize that Flatow's ability to collect the punitive damages portion of his judgment is severely restricted under the scheme set up by Congress in the Victims Protection Act. We do not believe, however, that our reading of the statutes would lead to an absurd result; Flatow may yet be able to collect against Iranian property not subject to the Iranian regulations.[12] Moreover, at the time of Flatow's selection under the Victims Protection Act, Flatow was aware – or should have been aware – that his ability to collect the punitive damages portion of the default judgment would be quite limited. The notice implementing the payment scheme established by the Act warned claimants in Flatow's position of the consequences of retaining a right to pursue punitive damages:

> Because of the comprehensive sanctions programs in place against Iran pursuant to IEEPA and against Cuba pursuant to TWEA, *see* 31 C.F.R. Parts 515, 535, and 560, virtually every transaction involving Iranian or Cuban property within the jurisdiction of the United States is either "prohibited" or

[12] For instance, Flatow may be able to collect the remainder of his judgment against Iranian property not subject to the jurisdiction of the United States.

> "regulated," i.e., permitted only by a general license in regulations promulgated by the Office of Foreign Assets Control (OFAC), Department of the Treasury, or by a specific license issued by OFAC. . . . Thus, virtually all Iranian or Cuban property within the jurisdiction of the United States is "property with respect to which financial transactions are prohibited or regulated pursuant to" IEEPA or TWEA. *Section 2002(a)(2)(D)* [of the Victims Protection Act] *therefore prohibits an applicant who elects the 100 per cent option from seeking to execute his or her punitive damage award against, or from seeking to attach, virtually all Iranian or Cuban assets within the jurisdiction of the United States.*

Notice: Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran, 65 Fed. Reg. 70,382, 70,384 (Nov. 22, 2000) (emphasis added). The plain meaning of the statute and regulations precludes relief for Flatow.

We hold that Flatow relinquished any claim as to the Cubic judgment when he accepted payments under the Victims Protection Act.

III. Elahi's Ability to Attach the Cubic Judgment

It is undisputed that Elahi did not receive payments under the Victims Protection Act, so that issue does not apply to his case. MOD argues, however,

that Elahi may not attach the Cubic judgment because he has not shown that any of the exceptions to foreign sovereign immunity from attachment set out in the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "the Act"), 28 U.S.C. §§ 1602-1611, are applicable in this case. We review the existence of sovereign immunity de novo. *See Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002).

A. MOD's Purported Waiver of Sovereign Immunity

The district court found that sovereign immunity did not prevent Elahi from attaching the Cubic judgment because MOD had waived its immunity by both submitting to arbitration at the ICC and then seeking to have the ICC award confirmed in a federal court. As we explain below, the district court erred in this portion of its analysis by confounding two different aspects of foreign sovereign immunity.

The FSIA is "a comprehensive statute containing a set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Republic of Austria v. Altmann*, 159 L. Ed. 2d 1, 124 S. Ct. 2240, 2249 (2004) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983)) (internal quotations omitted). The FSIA codified the "restrictive" theory of foreign sovereign immunity, which held that a foreign sovereign's immunity is "confined to suits

involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487. However, while the FSIA represented a significant development in how claims of foreign sovereign immunity are to be adjudicated in the courts of this country, it did not repeal the conceptual framework of foreign sovereign immunity as it had developed prior to the FSIA's passage. In particular, the FSIA preserved a distinction between two different aspects of foreign sovereign immunity: jurisdictional immunity – that is, a foreign sovereign's immunity from actions brought in United States courts – and immunity from attachment – a foreign sovereign's immunity from having its property attached or executed upon. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002). The FSIA's structure demonstrates that it preserves the distinction between these two types of immunity. On the one hand, § 1604 establishes a default rule that a foreign sovereign will be immune from the jurisdiction of United States courts unless one of the exceptions set out in § 1605 applies; on the other hand, § 1609 provides that the property of foreign states and their instrumentalities will be immune from attachment and execution unless one of the exceptions set out in § 1610 applies. A foreign sovereign's waiver of immunity is one of the exceptions to both jurisdictional immunity and immunity from attachment. *See* 28 U.S.C. §§ 1605(a)(1), 1610(a)(1) and (b)(1).

Elahi contends that MOD's actions in seeking to confirm the ICC award against Cubic resulted in an implicit waiver of its foreign sovereign immunity.[13] We agree to the extent that Elahi is referring to MOD's jurisdictional immunity from suit. In other words, we agree that MOD implicitly waived its immunity from being subjected to the jurisdiction of United States courts when it sought to confirm the ICC award; in fact, MOD concedes as much. MOD Brief in no. 03-55015 at 6. The question we must address, however, is whether MOD's waiver of jurisdictional immunity also constituted a waiver of its immunity from attachment of its property under 28 U.S.C. §§ 1610(a)(1) or (b)(1).

Prior to the passage of the FSIA, the courts that had addressed this question had held that a foreign state's waiver of jurisdictional immunity did not constitute a waiver of its immunity from attachment of its property. *See Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 626 (4th Cir. 1964) ("A distinction has been drawn between jurisdictional immunity and immunity from execution of the property of a sovereign, and waiver of the former is not necessarily a waiver of the latter."); *Dexter & Carpenter v. Kunglig*

[13] Elahi appears to concede that MOD is an agency and instrumentality of Iran and is therefore subject to the provisions of the FSIA. *See* 28 U.S.C. § 1603(b) (defining an "agency or instrumentality" of a foreign state). Under 28 U.S.C. § 1603(a), MOD also qualifies as a "foreign state" for purposes of the FSIA.

Jarnvagsstyrelsen, 43 F.2d 705, 708 (2d Cir. 1930) (holding that waiver of jurisdictional immunity does not waive immunity from attachment); *Rich v. Naviera Vacuba S.A.*, 197 F. Supp. 710, 722-23 (E.D.Va.1961) (same). The FSIA narrowed the scope of immunity from attachment,[14] but as we explained above, the structure of the Act makes clear that it preserved the traditional distinction between the two forms of immunity. The scant post-FSIA authority that speaks on the subject suggests that the statute did not change the earlier rule that waiver of jurisdictional immunity does not constitute a waiver of immunity from attachment. *See* Restatement (Third) of Foreign Relations Law of the United States § 456(1)(b) (noting that under international law, "a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit."); *DeLetelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984) (noting that, in enacting FSIA, Congress did not intend "to reverse completely the historical and international

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[14] Prior to the FSIA, foreign states and their instrumentalities enjoyed virtually absolute immunity from having their property attached or executed upon. *See Conn. Bank of Commerce*, 309 F.3d at 251-52. The legislative history of the FSIA makes clear that its drafters intended to "modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity" in FSIA. H.R. Rep. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626 (hereinafter "FSIA House Report").

antipathy to executing against a foreign state's property even in cases where a judgment could be had on the merits"). For these reasons, and because we construe the waiver provisions in FSIA narrowly, *see Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), we conclude that MOD's waiver of jurisdictional immunity did not also constitute a waiver of its immunity from having its property attached.

B. Attachment Under § 1610(b)(2) of the FSIA

Even though we reject the district court's finding that MOD had waived its sovereign immunity from attachment, we nonetheless affirm its determination that the Cubic judgment is subject to attachment by Elahi because we conclude that the judgment is subject to the exception in § 1610(b)(2) of the FSIA.[15] The relevant part of that section provides that

> [A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of

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[15] We may affirm the district court on any ground supported by the record. *City Solutions, Inc. v. Clear Channel Communications*, 365 F.3d 835, 842 (9th Cir. 2004) (quoting *Dixon v. Wallowa County*, 336 F.3d 1013, 1018 (9th Cir. 2003)).

> the United States or of a State after the effective date of this Act, if –
>
> . . .
>
> the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

28 U.S.C. § 1610(b)(2). This provision will apply to the Cubic judgment if: 1) MOD is engaged in commercial activity in the United States; and 2) Elahi's claim is one for which MOD is not immune by virtue of 28 U.S.C. § 1605(a)(7).

MOD was "engaged in commercial activity" within the meaning of 28 U.S.C. § 1610(b). The phrase "commercial activity" is defined by FSIA as meaning "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The statutory definition further makes clear that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*; *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 356, 123 S. Ct. 1471, 123 L. Ed. 2d 47 (1993). MOD's dispute with Cubic arose out of a contract between MOD's predecessor and Cubic for the purchase of military equipment. We have twice recognized that "a contract to purchase military supplies, although

clearly undertaken for public use, is commercial in nature. . . ." *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1023 (9th Cir. 1987); *see also Park v. Shin*, 313 F.3d 1138, 1145 (9th Cir. 2002) (quoting *Joseph*). Although perhaps not technically bound by these statements, we find them persuasive because they are consistent with the legislative history of the FSIA, *see* FSIA House Report at 16 ("[A] contract by a foreign government to buy provisions or equipment for its armed forces . . . constitutes a commercial activity."), and with the holdings of other courts which have considered the question. *See McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985) (holding that "the intent of the purchasing sovereign to use the goods for military purposes does not take the transaction outside of the 'commercial' exception to sovereign immunity"); *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 7-8 (D. D.C. 1999) (holding that contract for sale of MiG-29 fighters was commercial activity for purposes of FSIA). We therefore hold that MOD is engaged in commercial activity in the United States within the meaning of the FSIA because of its contractual relationship with Cubic.

We also conclude that Elahi's claim is one for which MOD is not immune by virtue of 28 U.S.C. § 1605(a)(7). 28 U.S.C. § 1605(a)(7) explains that "a foreign state shall not be immune from the jurisdiction of the courts of the United States" in cases involving state-sponsored terrorist activity. The term "foreign state" in 28 U.S.C. § 1605(a)(7) is defined in

28 U.S.C. § 1603(a), which states that a "foreign state" as used in the statute "includes a political subdivision of a foreign state or an agency or instrumentality." Thus, under § 1605(a)(7), once a foreign state has engaged in state-sponsored terrorist activity, all of its agencies and instrumentalities are likewise not immune from jurisdiction.

In this case, Elahi seeks to attach MOD's property to enforce a judgment brought under § 1605(a)(7) against Iran, and under § 1603(a), Iran was a "foreign state" that included *all* of the "agencies and instrumentalities" of Iran. One of those agencies was MOD. Thus, the underlying removal of Iran's sovereign immunity under § 1605(a)(7) also removed the sovereign immunity of MOD, and for the purpose of determining whether MOD lacks immunity from attachment under § 1610(b)(2), the underlying D.C. Circuit judgment was one for which MOD was "not immune by virtue of" § 1605(a)(7).[16]

Although § 1610(a) also discusses foreign state immunity from attachment, this reading of § 1610(b)(2) is consistent with the structure of § 1610 as a whole. In § 1610(a), Congress denied sovereign immunity from attachment to a foreign state's property "used for a commercial activity" in the United States. In

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[16] Because we conclude that the Cubic judgment is subject to attachment under 28 U.S.C. § 1610(b)(2), we do not consider whether the judgment may be subject to attachment under any other exception to immunity from attachment in the FSIA that might apply.

§ 1610(b)(2), Congress denied attachment immunity for property of foreign state agencies "engaged in commercial activity." In both instances, the underlying purpose was to deny sovereign immunity from attachment to satisfy judgments against foreign states in circumstances where the foreign government is engaging in commercial activity in the United States – either directly, through the use of particular property, or indirectly, through the commercial activities of an agency or instrumentality.

While we hold that a foreign state agency is not immune from attachment of its property to satisfy a judgment against a foreign state so long as the conditions of § 1610(b)(2) are met, we do not hold that the property of any foreign state agency or instrumentality can be used to satisfy any judgment against a foreign state. Rather, once it has been established that a foreign state agency or instrumentality has no immunity from attachment of its property under § 1610(b)(2), it is then necessary also to determine whether the agency or instrumentality is liable so that its property may be attached. We explained that attachment immunity and attachment liability are distinct issues in *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1069 (9th Cir. 2003). While "the enumerated exceptions to the FSIA provide the exclusive source of subject-matter jurisdiction over civil actions brought against foreign states, . . . the FSIA does not resolve questions of [attachment] liability. Questions

of liability are addressed by *Bancec*,[17] which examines the circumstances under which a foreign entity can be held substantively liable for the foreign government's judgment debt." *Id.* (internal citation omitted).

In *Bancec*, the Supreme Court held that foreign agencies and instrumentalities, even those wholly owned by a foreign government, are subject to a presumption of separate judicial status. 462 U.S. at 626-27. Thus, in the ordinary course of business, a foreign instrumentality will *not* have its property subject to attachment to satisfy a judgment against a foreign state, regardless of § 1610(b)(2). The Court noted, however, that there are a number of situations in which that presumption of separate status can be overcome. *Id.* at 627-28. Most significantly for our purposes here, the presumption of separate status can be overcome when it can be shown that the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629. In *Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1380 n. 7 (5th Cir. 1992), for example, the Fifth Circuit discussed five "*Bancec*" factors to determine when the presumption of separate judicial status should be overcome in determining attachment liability. *See id.* (describing "(1) the level of economic

[17] The full citation of *Bancec* is *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983) but is commonly known as the "*Bancec*" case.

control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations"); *see also Flatow I*, 308 F.3d at 1071 n. 9 (discussing *Walter Fuller*). Here, an analysis of MOD's relationship to Iran with respect to each of these factors makes clear that the *Bancec* presumption of separate judicial status is overcome; MOD is a central organ of the Iranian government under direct control of the government. As a result, MOD not only lacks immunity from attachment but is also liable for attachment of its property to enforce the underlying judgment against Iran.

In sum, to determine whether the property of a foreign state agency or instrumentality can be attached to enforce a judgment against a foreign state, we apply a two-step analysis. First, we look at whether the judgment is one for which the agency is not immune from attachment under FSIA; and second, if so, we determine whether the foreign agency or instrumentality should be held liable for attachment under *Bancec*. Applying this two-step analysis to this case, we find that a) MOD's Cubic judgment falls under the exception to foreign sovereign immunity from attachment set out in 28 U.S.C. § 1610(b)(2); and b) MOD is liable for attachment of

its property to enforce a judgment against Iran under *Bancec*.

C. Exemptions from Attachment Under § 1611 of FSIA

MOD argues that, even if the Cubic judgment is subject to attachment under § 1610 of FSIA, Elahi is still precluded from attaching the judgment because it falls under one of the exemptions from attachment set out in 28 U.S.C. § 1611(b). We examine each of the arguments advanced by MOD in turn.

1. The Cubic Judgment as Military Property Under § 1611(b)(2) of the FSIA

MOD argues that the Cubic judgment is exempted from attachment because it is the type of military property described in § 1611(b)(2) of the FSIA. That section provides that

> Notwithstanding the provisions of section 1610 of [the FSIA], the property of a foreign state shall be immune from attachment and from execution, if
>
> . . .
>
> the property is, or is intended to be, used in connection with a military activity and
>
> (A) is of a military character, or
>
> (B) is under the control of a military authority or defense agency.

28 U.S.C. § 1611(b)(2). MOD appears to concede that the Cubic judgment is not property of a military character under subparagraph (A),[18] instead stressing that the judgment falls under subparagraph (B) as property under the control of a military authority or defense agency. Our inquiry focuses on whether the Cubic judgment is property that is, or is intended to be, used in connection with a military activity.

We agree with the district court's conclusion that the Cubic judgment is not exempt from attachment under 28 U.S.C. § 1611(b)(2). *See* District Court Order at 1149. The plain language of § 1611(b)(2) requires MOD to establish that there is some present or future intended use for the property that is connected to military activity. In addition, the FSIA's legislative history emphasizes that "property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune)." FSIA House Report at 31. MOD has made no showing that any proceeds from the Cubic judgment are to be used in any way related to Iran's military activities;[19] in fact, MOD's only

[18] The FSIA's legislative history makes clear that the Cubic judgment is not property of a military character for purposes of this provision. *See* FSIA House Report at 31 ("Property is of a military character if it consists of equipment in the broad sense-such as weapons, ammunition, military transport, warships, tanks, communications equipment.").

[19] We note, however, that even if MOD had argued that the proceeds from the Cubic judgment were destined to fund military activities, such an indirect relation between the property at

(Continued on following page)

statements regarding the future of any monies stemming from the judgment is that they are to revert to Iran's Central Bank. *See* section III. C. 2., *infra*. We therefore hold that Elahi is not barred from attaching the Cubic judgment by virtue of the military property exemption set out in 28 U.S.C. § 1611(b)(2).[20]

2. *The Cubic Judgment as Property of a Central Bank under § 1611(b)(1) of the FSIA*

MOD argues that if the Cubic judgment is not to be treated as military property under § 1611(b)(2) of the FSIA, it should then be considered the property of Iran's central bank under § 1611(b)(1). The relevant portion of that section provides that

> Notwithstanding the provisions of section 1610 of [the FSIA], the property of a foreign state shall be immune from attachment and from execution, if

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issue and military activities may not be sufficient to make the exemption applicable.

[20] MOD argues that our reading of the statute would run counter to the congressional purpose behind the military property exemption, which was to encourage purchases of military equipment in the United States. While we agree that Congress intended to provide some protection to purchases of military equipment by foreign governments, we reject MOD's contention that Congress meant this protection to be absolute.

> . . . the property is that of a foreign central bank or monetary authority held for its own account. . . .

28 U.S.C. § 1611(b)(1). During the district court proceedings, MOD introduced the declaration of Dr. Assadollah Karimi, an alleged specialist in Iranian banking law, who concluded that "all sums relating to the ministries and governmental institutions [of Iran] do belong to the Bank Markazi [Iran's central bank] and that they have to be settled to the Treasury General's account to be expended in due time according to the budget act." Karimi Declaration ¶ 16. MOD claims that, because any proceeds of the Cubic judgment would revert to Iran's central bank, it falls under the scope of § 1611(b)(1).

We agree with the district court's conclusion that the Cubic judgment is not exempted from attachment under § 1611(b)(1) of the FSIA. The plain language of the statute requires that the property at issue not only belong to a foreign state's central bank, but also be "held for [the central bank's] *own account*. . . ." 28 U.S.C. § 1611(b)(1) (emphasis added). The FSIA's legislative history makes clear that the exemption was meant to apply to

> funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account" – i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to

> finance the commercial transactions of other entities or of foreign states.

FSIA House Report at 31. Even if the statements in Dr. Karimi's declaration could be stretched to mean that the Cubic judgment belonged to Iran's central bank, MOD cannot show that the judgment is "used or held in connection with central banking activities."[21] Indeed, MOD's position in this case would mean that virtually any funds belonging to any Iranian agency would be subject to the central bank exemption. We reject such a broad reading of § 1611(b)(1) and hold that the Cubic judgment is not exempted from attachment by that provision.

* * *

We conclude that the Cubic judgment is not exempted from attachment under either prong of § 1611(b) of the FSIA.

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[21] The district courts that have considered the central bank exemption so far have read it narrowly; in some cases, the exemption has been found not to apply even where the funds unquestionably belonged to the foreign state's central bank. *See Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C.*, 919 F. Supp. 13, 17 (D. D.C. 1994) (holding that central bank exemption did not apply to an account of Peru's central bank because the funds were being used to guarantee loans to commercial banks and not as part of central banking activities); *Weston Compagnie de Finance et D'Investissement, S.A. v. Republica del Ecuador*, 823 F. Supp. 1106, 1114 (S. D.N.Y. 1993) (holding that some of the funds belonging to Ecuador's central bank were not exempted from attachment because they were used for commercial banking purposes).

D. The Impact of the Iranian Regulations on Elahi's Attachment

MOD argues that the Iranian regulations issued pursuant to the IEEPA, 31 C.F.R. pts. 535 and 560, prohibit attachment of the Cubic judgment by Elahi. Elahi points out, correctly, that MOD did not raise this issue before the district court. Although we could decline to reach the issue for that reason, we exercise our discretion to consider the merits of MOD's arguments. *See Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990) ("We may consider an argument not raised in the district court . . . if it is an issue of law not dependent on a factual record developed by the parties.").

As we explained in section II, *supra*, the Cubic judgment is property regulated by the United States through the IACR, 31 C.F.R. pt. 535. In particular, 31 C.F.R. § 535.201 provides that "no property subject to the jurisdiction of the United States . . . in which on or after [November 14, 1979] Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized." If this were all that the regulations provided, MOD would likely be correct that the regulations would prevent Elahi from attaching the Cubic judgment. However, the regulations also provide for general licenses which authorize broad classes of transactions – transactions that would otherwise be prohibited by § 535.201. *See* 31 C.F.R. §§ 535.504-535.580. One of these general licenses provides that "transactions involving property in

which Iran or an Iranian entity has an interest are authorized where . . . the interest in the property of Iran or an Iranian entity . . . arises after January 19, 1981." 31 C.F.R. § 535.579(a)(2). MOD's interest in the Cubic judgment "arose" on December 7, 1998, when the district court confirmed the ICC award against Cubic. *MOD v. Cubic Def. Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998). Therefore, because any transactions involving the Cubic judgment are authorized under 31 C.F.R. § 535.579, Elahi is not barred from attaching the judgment by the IACR.[22]

E. MOD's Collateral Attacks on Elahi's Default Judgment

In its reply brief and in supplemental filings, MOD has raised new arguments attacking the original default judgment that Elahi is seeking to enforce. MOD contends that we can consider these late-raised arguments because they challenge the subject-matter jurisdiction of the District Court for the District of Columbia when it issued the default judgment. We address briefly MOD's contentions.

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[22] The Iranian Transactions Regulations, 31 C.F.R. pt. 560, impose separate restrictions on the ability to transfer funds from a United States entity to an Iranian entity. *See* 31 C.F.R. § 560.216. However, these regulations would not come into play where Elahi successfully attaches the judgment against Cubic, since the funds would then be transferred from Cubic to Elahi, thereby bypassing any Iranian entities.

The Supreme Court has explained that "[a] defendant is always free to ignore [a] judicial proceeding, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982); *see also Practical Concepts, Inc. v. Republic of Bolivia*, 258 U.S. App. D.C. 354, 811 F.2d 1543, 1547 (D.C. Cir. 1987). It is therefore clear that MOD could have mounted a collateral attack on the Elahi default judgment in the proceedings below on the ground that the D.C. district court lacked either personal or subject-matter jurisdiction. MOD did not mount such a challenge below, however, nor did it do so in its opening brief before this court. Because personal jurisdiction – unlike subject-matter jurisdiction – is waivable, *see Ins. Corp. of Ireland*, 456 U.S. at 703 ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."), MOD has waived any collateral challenges to the default judgment based on the issuing court's lack of personal jurisdiction. *See Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000) ("Although [Hayhurst] certainly did have the right to object to personal jurisdiction after the default judgment was entered against him, he then squandered that opportunity by failing to raise it.").

The analysis is different regarding collateral attacks challenging the issuing court's subject-matter

jurisdiction because that type of jurisdiction "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630, 152 L. Ed. 2d 860, 122 S. Ct. 1781 (2002).[23] We conclude, however, that none of the claims that MOD has raised to attack the default judgment issued by the D.C. district court actually challenge that court's subject-matter jurisdiction – that is, its power to hear the case. *See id.* MOD's arguments regarding the constitutionality of the statutes underlying the default judgment are challenges to the merits of the decision, not to the court's jurisdiction. 28 U.S.C. § 1330(a) provides that district courts shall have original jurisdiction of any non-jury civil action against any foreign state or its agency or instrumentality, so long as such action falls under one of the exceptions to foreign sovereign immunity. As we have explained, see section III. B., *supra*, Elahi's action fell under the state-sponsored terrorism exception to sovereign immunity set out in 28 U.S.C. § 1605(a)(7). The District Court for the District of Columbia therefore had subject-matter jurisdiction over Elahi's claim.

MOD relies heavily on a recent decision by the Court of Appeals for the District of Columbia,

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[23] We do not hold that the non-waivability of subject-matter jurisdiction means that a party can wait as long as MOD has to raise its collateral attack. However, because MOD's claims fail on the merits, we will assume for purposes of this case that subject-matter jurisdiction is an issue that can be raised at any point, even in proceedings mounting a collateral attack on a default judgment.

Cicippio-Puleo v. Islamic Republic of Iran, 359 U.S. App. D.C. 299, 353 F.3d 1024 (D.C. Cir. 2004). In *Cicippio*, the D.C. Circuit held that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." *Id.* at 1033. MOD argues that, because the D.C. Circuit's holding in *Cicippio* makes clear that the D.C. district court erred in issuing the default judgment, that judgment is void *ab initio* and should not be enforced. As we have explained, however, "[a] judgment is not void merely because it is erroneous." *United States v. Holtzman*, 762 F.2d 720, 724 (9th Cir. 1985) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2862 at 198 (1973)). A judgment is void only if the issuing court lacked subject-matter jurisdiction over the action or if the judgment was otherwise entered in violation of due process. *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989). As we explained above, the district court for the District of Columbia did have subject-matter jurisdiction over Elahi's action. In fact, the D.C. Circuit in *Cicippio* recognized that Congress had conferred subject-matter jurisdiction over the type of action Elahi brought against Iran, even as it concluded that Congress had not created a cause of action upon which a plaintiff like Elahi could proceed. *See Cicippio*, 353 F.3d at 1034 ("[28 U.S.C. § 1605(a)(7)] confers subject-matter jurisdiction on federal courts over [lawsuits for damages for certain enumerated acts of terrorism], but does not create a private right of action."). MOD has also not shown that the district court that

issued the default judgment in favor of Elahi acted in a manner inconsistent with due process. *Cf. In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) (holding judgment void because aggrieved party had not received adequate notice of the proceedings).

For these reasons, we reject MOD's collateral challenges to Elahi's default judgment.

CONCLUSION

We affirm the district court's denial of Flatow's motion for leave to intervene, as well as its determination that Flatow has relinquished any claim to attaching the Cubic judgment by accepting payments pursuant to the Victims Protection Act. We also affirm the district court's decision that the Cubic judgment is subject to attachment by Elahi and reject MOD's collateral attacks on Elahi's default judgment.

AFFIRMED

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, Petitioner, vs. CUBIC DEFENSE SYSTEMS, INC., Respondent.

CIV. NO. 98CV1165 (RMB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

236 F. Supp. 2d 1140;
2002 U.S. Dist. LEXIS 25883

November 26, 2002, Decided
November 26, 2002, Filed

COUNSEL: For THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, plaintiff: Mina Almassi, Law Offices of Mina Almassi, Los Altos, CA. Steven R Perles, Law Offices of Steven R. Perles, Washington, DC. Jane Carol Norman, Bond Conte and Norman, Leucadia, CA. Anthony J Van Patten, Anthony J Van Patten Inc, Glendale, CA.

For CUBIC DEFENSE SYSTEMS, INC., defendant: Paul C Workman, Whitman Breed Abbott and Morgan, Los Angeles, CA. Kerry S Sullivan, Heard and O'Toole, New York, NY.

For STEPHEN M FLATOW, intervenor-plaintiff: Steven R Perles, Law Offices of Steven R Perles, Washington, DC.

For DARIUSH ELAHI, intervenor-plaintiff: Steve S Gohari, Law Office of Steve S Gohari, Long Beach,

CA. Jonathan R Mook, DiMuro Ginsberg and Mook, Alexandria, VA.

JUDGES: Rudi M. Brewster, UNITED STATES SENIOR DISTRICT JUDGE.

OPINION BY: Rudi M. Brewster

OPINION:

ORDER GRANTING PETITIONER'S MOTION FOR JUDICIAL DETERMINATION THAT ITS JUDGMENT AGAINST CUBIC DEFENSE SYSTEMS IS IMMUNE FROM ATTACHMENT OR EXECUTION BY STEPHEN M. FLATOW [No. 81] AND DENYING PETITIONER'S MOTION FOR JUDICIAL DETERMINATION THAT ITS JUDGMENT AGAINST CUBIC DEFENSE SYSTEMS IS IMMUNE FROM ATTACHMENT OR EXECUTION BY DARIUSH ELAHI [No. 83].

For the reasons analyzed here below, the Court GRANTS the MOD's "Motion for Judicial Determination That its Judgment Against Cubic Defense Systems is Immune from Attachment or Execution by Stephen M. Flatow," and DENIES the MOD's "Motion for Judicial Determination That its Judgment Against Cubic Defense Systems is Immune from Attachment or Execution by Dariush Elahi."

I. ISSUE

The MOD's motions raise the issue whether the judgment against Cubic is immune from attachment

or execution by liens or garnishment. The burden of proof on this issue rests on the MOD. *See, e.g., International Insurance Co. v. Caja Nacional de Ahorro Y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002) (stating that "the ultimate burden of proving immunity rests with the foreign state.").

II. BRIEF PROCEDURAL HISTORY

The matter now before the Court arises out of a petition to confirm an International Chamber of Commerce ("ICC") arbitration award in favor of the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("the MOD") against Cubic Defense Systems, Inc. ("Cubic"). This Court entered judgment in favor of the MOD confirming the award on December 7, 1998. *See Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998). Subsequently, Cubic filed a supersedeas bond in the amount of $5,400,000 and appealed the decision to the Ninth Circuit, where it is now pending. After this Court confirmed the ICC award, Stephen Flatow and Dariush Elahi – judgment creditors of Iran – filed notices of lien against the MOD's judgment against Cubic ("the MOD's judgment"). The instant motions, filed on September 13, 2002, seek a judicial determination that the Mod's judgment is immune from attachment or execution by Flatow and Elahi.

III. FACTUAL BACKGROUND

(A) Stephen Flatow

Stephen Flatow's daughter was killed in an Iranian-sponsored terrorist attack in the Gaza Strip near Israel. Flatow filed suit against Iran in the U.S. District Court for the District of Columbia, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act"). In March 1998, he obtained a default judgment against Iran for compensatory damages and punitive damages totaling $247,513,220. *See Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1 (D.D.C. 1998). Pursuant to 28 U.S.C. § 1963, Mr. Flatow registered his judgment in the Eastern District of Virginia in September 1998.

On December 8, 1998, this Court issued a judgment confirming a $2,808,519 ICC arbitration award in favor of the MOD against Cubic, arising out of Cubic's breach of a military sales contract in 1978. Thirteen days later, Flatow obtained a Summons in Garnishment from the Eastern District of Virginia, directing Cubic to relinquish to him any and all Iranian assets in its possession. He then petitioned this Court to intervene post-judgment in the confirmation action between the MOD and Cubic. This Court's denial of Flatow's motion to intervene, issued on April 6, 1999, is currently on appeal to the Ninth Circuit. On April 29, 1999, Flatow filed a notice of lien in this Court, seeking to garnish the debt owed to the MOD by Cubic.

In October 2000, President Clinton signed the Trafficking Victims Protection Act of 2000 ("Victims Protection Act"), a law intended to allow victims of state-sponsored terrorism to recover damages owed to them by foreign nations. Under the law, the United States uses the rental proceeds of blocked foreign assets to pay compensatory damages to certain holders of judgments[1] issued pursuant to the Antiterrorism Act. The law affords those holders who qualify two options:

> (A) Receive an amount equal to 110% of one's compensatory damages in exchange for relinquishing the right to recover *both* compensatory and punitive damages under the judgment; or
>
> (B) Receive an amount equal to 100% of the compensatory damages component of the judgment, but *retain* the right to recover punitive damages.

See Victims Protection Act at §§ 2002(a)(1)(A), 2002(a)(1)(B). Mr. Flatow chose Option (B) and received a lump sum payment of over $26,000,000 from the United States in January 2001. In June 2001, the MOD petitioned the Ninth Circuit to dismiss Flatow's appeal of the denial of his Motion to Intervene on the

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[1] Only victims of state-sponsored terrorism who obtained judgments prior to July 20, 2000 are entitled to compensation under the Victims Protection Act. *See* Victims Protection Act § 2002(a)(2). Thus, Flatow qualifies for compensation but Elahi does not.

ground that, by exercising Option (B), Flatow relinquished his right to attach the MOD's judgment against Cubic. In December 2001, the Ninth Circuit stayed Flatow's appeal until this Court resolves the issue whether the MOD's judgment is immune from attachment. The MOD filed the instant "Motion for a Judicial Determination that Its Judgment Against Cubic Defense Systems is Immune from Attachment or Execution by Stephen M. Flatow" on September 13, 2002.

(B) Dariush Elahi

Dariush Elahi's brother was assassinated by Iranian agents in Paris in 1990. Elahi filed suit in the District of Columbia and, on December 20, 2000, obtained a default judgment for $11,740,035 in compensatory damages and $300,000,000 in punitive damages. *See Elahi v. Islamic Republic of Iran,* 124 F. Supp. 2d 97, 115 (2000). Elahi registered the judgment in the Southern District of California and filed a notice of lien on November 1, 2001, seeking to garnish the judgment debt owed to MOD by Cubic. The MOD filed a "Motion for a Judicial Determination that Its Judgment Against Cubic Defense Systems is Immune from Attachment or Execution by Dariush Elahi" on September 13, 2002.

IV. ANALYSIS

The MOD offers five arguments in support of its Motions against Flatow and Elahi. They are as

follows: (A) Neither Iran nor MOD may be held liable for punitive damages under Section 1606 of the Foreign Sovereign Immunities Act (28 U.S.C. § 1602 *et seq.*) ("FSIA"); (B) Flatow has relinquished his right to attach the judgment by exercising Option (a)(1)(B) of Section 2002 of the Victims Protection Act of 2000; (C) the judgment is immune from attachment because it is property of military character pursuant to Section 1611(b)(2) of the FSIA; (D) the judgment is immune because it is the property of a central bank under Section 1611(b)(1) of the FSIA; and (E) the judgment is immune from attachment because the President has waived the attachment provisions of Section 1610(f)(1)(a) of the FSIA. The Court addresses each argument in turn, in Subheadings A-E.

(A) Whether the MOD is Liable for Punitive Damages

The MOD first maintains that it cannot be held liable for punitive damages under 28 U.S.C. § 1606, which governs the extent of liability for foreign sovereigns. This argument is a collateral attack on the underlying judgments issued in the District of Columbia. The MOD proffered no defense in that forum, where both Flatow and Elahi obtained default judgments against Iran that include punitive damages awards in the hundreds of millions of dollars. *See Flatow,* 999 F.Supp. at 34 (D.D.C. 1998); *Elahi,* 124 F. Supp. 2d at 115. Those judgments – which the MOD declined to appeal – were registered in the Southern District of California pursuant to 28 U.S.C. § 1963.

As such, they warrant the same treatment as a judgment entered directly by this Court. *See* 28 U.S.C. § 1963.

The MOD had a full and fair opportunity to litigate the punitive damages issue in the District of Columbia. It ignored that opportunity. Principles of comity and *res judicata* counsel against affording the MOD another "bite at the apple." *See, e.g., Indian Head Nat'l Bank v. Brunelle,* 689 F.2d 245, 249 (deferring to the court of rendition on application for relief from default judgment); *Universal Display & Sign Co. v. Del Mar News Agency,* 541 F.2d 142, 144 (3d Cir. 1976) (stating that a default judgment may not be collaterally attacked where the parties had a previous opportunity to adjudicate). Furthermore, although "[a] court of registration has jurisdiction to entertain motions challenging the underlying judgment," *Federal Deposit Ins. Corp. v. Aaronian,* 93 F.3d 636, 639 (9th Cir. 1996), the Ninth Circuit has stated that "such motions are disfavored." *Id.* As a general rule, the rendering court is the proper forum in which to seek relief from the underlying judgment. *See id. See also Brunelle,* 689 F.2d at 249 (stating that "comity among the federal district courts is furthered if the registering court refers the question of relief to the court which ordinarily entered the judgment."). The only clear exception to the rule involves those cases that concern challenges to the rendering court's jurisdiction. *See, e.g., Covington Industries, Inc., v. Resintex A.G.,* 629 F.2d 730, 734 (2d Cir. 1980); *Mu-Petco Shipping Co. v. Divesco, Inc.,* 101 F.R.D. 753,

755 (S.D. Miss. 1984) (stating that "only jurisdictional issues may be raised to collaterally attack a judgment."). The MOD's argument is grounded in statutory interpretation. It is not jurisdictional in nature. Therefore, the Court now adheres to the general rule and declines the MOD's invitation to review the punitive damages awards.[2]

(B) Whether Flatow has Waived his Right to Attach the MOD's judgment

As the Court noted previously,[3] Flatow waived the right to collect his compensatory damages in exchange for a lump-sum payment of more than $26,000,000 from the United States, but retained a general right to satisfy his punitive damages award through attachment, execution, etc. That general

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[2] The issues of comity and efficient judicial administration aside, the Court finds the substance of the MOD's argument to be wholly unpersuasive. The MOD maintains that an October 28, 2000 amendment to 28 U.S.C. § 1606 ("Extent of Liability of Foreign States") repealed legislation that permitted punitive damages against a foreign state. *See* Pet'r's Br. at 8. Flatow obtained his judgment against Iran in 1998, two years *prior to* the repeal upon which the MOD relies. Absent clear evidence that Congress intended the amendment to have retroactive effect, this subsequent change in law has no effect on the validity of Flatow's judgment. *See Landgraf v. USI Film Products*, 511 U.S. 244, 272, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994) (presumption against retroactivity applies absent clear evidence of Congressional intent to the contrary). The MOD offers no evidence of retroactive intent nor has the Court found any; thus, this argument fails on the merits.

[3] *See supra* Part III(A) (Factual Background).

right, however, is limited by the three specific exemptions listed in Section 2002(a)(2)(D) of the Victim's Protection Act. Flatow has waived the right to attach: (1) property at issue in claims against the United States before an international tribunal, (2) property that is the subject of awards rendered by such a tribunal,[4] and (3) property that is subject to 28 U.S.C. § 1610(f)(1)(A) (Foreign Sovereign Immunities Act). The exemptions, it seems, have swallowed the rule.

1. Property At Issue in Claims Against the United States

The MOD argues that its judgment against Cubic falls within the first exemption relating to "property at issue in claims against the United States before an international tribunal." Victims Protection Act at § 2002(a)(2)(D). According to MOD, "the asset at issue between Cubic and MOD in the instant case is at issue in Case *B/61* (*See* MOD's moving papers, Exhibits "1" and "2") between the United States and Iran in the Hague." Pet'r's Reply at 9. Exhibit "2" entitled "Statement No. 16," is Iran's submission to the Hague concerning the property at issue in Case B/61. Under the heading "Cubic Items," Iran states that "[t]he items at issue are sophisticated defence [sic] equipment called Air Combat Maneuvering

[4] MOD has not raised this exemption in any of its arguments. Therefore, the Court does not address it.

Range . . . produced under the contract entered into with [Cubic] on 3 October 1977. . . ." Pet'r's Ex. "2" at 1. Clearly, this is the contract that led to the ICC award confirmed by this Court in its judgment of December 8, 1998. If Statement No. 16 said no more, the Court might agree that the MOD's judgment qualifies as property at issue in claims before an international tribunal and is, therefore, immune from attachment. However, elsewhere within Statement No. 16, Iran distinguishes the ICC Award that underlies this Court's judgment from the claims at issue before the Hague:

> **The ICC proceeding . . . cannot have *res judicata* effect on the present case. This is because the present [claim before the Hague] lack three identities (identity of object, identity of parties, and identity of subject matter) required for that purpose . . . The opposing party in this case is, obviously not a U.S. private company, but the United States government. The subject matter of this Case, *at variance with the ICC action*, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties.**

Pet'r's Exhibit "2" at 3-4 (emphasis added). Whatever the nature and current posture of the dispute before the Hague, by Iran's own admission, the subject matter of that action does not include the ICC Award confirmed by this Court. Therefore, the Court finds

that the MOD's judgment does not fall within the first exemption to Section 2002(a)(2)(D).

2. Property that is Subject to 28 U.S.C. § 1610(f)(1)(A) (Foreign Sovereign Immunities Act)

The MOD also argues that its judgment against Cubic falls within the third exemption from attachment contained in Section 2002(a)(2)(D), relating to property that is "subject to section 1610(f)(1)(A) of title 28, United States Code." Victims Protection Act at § 2002(a)(2)(D). The Court agrees. Section 1610(f)(1)(A) of Title 28 states:

> **Any property with respect to which financial transactions are prohibited or regulated pursuant to . . . the *International Emergency Economic Powers Act (50 U.S.C. 1701-1702)*, or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of judgment relating to a claim [against a foreign state] . . .**

(emphasis added).

Section 1610(f)(1)(A) incorporates the International Emergency Economic Powers Act ("the IEEPA"), a statute that empowers the President to prescribe regulations to regulate or prohibit "any transactions in foreign exchange" (50 U.S.C. § 1702) with nations or entities that pose "an unusual or

extraordinary threat [to] . . . the United States." 50 U.S.C. § 1701. Pursuant to that authority, the Office of Foreign Asset Control ("OFAC")[5] has promulgated regulations regulating and prohibiting transactions with Iran and its political subdivisions, including the MOD. *See* 31 C.F.R. § 535.301 ("Iran; Iranian Entity"). The property interests to which the regulations apply are myriad. Indeed, OFAC's definition of "property" is virtually all-encompassing, and specifically includes "judgments." *See* 31 C.F.R. § 535.311 ("Property; Property Interests"). Therefore, after following the statutory maze from Section 2002(a)(1)(D) of the Victims Protection Act, to Section 1610(f)(1)(A) of Title 28 (FSIA), to Section 1702 of Title 50 (IEEPA), to Section 535.301 of Chapter 31, Code of Federal Regulations (OFAC's definition of "property"), the Court concludes that the MOD's judgment falls squarely within the third exemption from attachment.

Flatow proffers two arguments against this plain reading of the relevant texts. First, he maintains that it violates the Convention on the Enforcement of Foreign Arbitral Awards ("the New York Convention")[6] because it permits the President to prohibit the attachment of judgments confirming ICC awards. This argument rests on faulty logic. Flatow errs when

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[5] OFAC is a subsidiary of the U.S. Dept. of Treasury.

[6] The New York Convention limits the authority of signatory nations to review or alter foreign arbitration awards. It is codified at 9 U.S.C. §§ 201-208.

he equates a prohibition on attachment of the award with a failure to enforce the award. The limitation on attachment contained in the statutory framework at issue relates only to the manner in which the federal government manages blocked foreign assets (including judgments confirming ICC awards) located within the United States. It does not alter the ICC award. Thus, the limitation does not violate the Convention.

Second, Flatow contends that the Court's interpretation yields an absurd result. He argues that the Victim's Protection Act is intended to aid victims in their efforts to recover judgments owed to them by state sponsors of terrorism. Thus, he maintains, an interpretation that virtually eradicates his ability to attach Iranian property is at odds with the very purpose of the statute. This argument, however, does not hold up well under close scrutiny.

To understand how Section 2002 functions, one must begin with Section 1610. Standing alone, Section 1610(f)(1)(A) "imports" OFAC's extremely broad definition of "property" to *allow* victims of terrorism such as Flatow to attach practically all Iranian property under the sun.[7] If an individual, however, avails himself of direct payment from the U.S. Treasury, then Section 2002(a)(2)(D) converts the broad attachment authority contained in Section

[7] Congress has, however, empowered the President to waive this broad attachment authority. *See infra* Part IV(E); 28 U.S.C. 1610(f)(3) ("The President may waive any provision in Paragraph (1) in the interest of national security.")

1610(f)(1)(A) into an equally broad ban on attachment. Essentially, through his exercise of Option (B) of Section 2002(a)(1), Flatow traded his statutory right to attach Iranian property located within the United States for a lump sum payment of over $26,000,000. The Court does not find this result "absurd."

Moreover, the Court's interpretation of the statutory and regulatory framework at issue is supported by specific legislative history. The Conference Committee report accompanying the Victims Protection Act specifically addresses the issue of judicial attachment in cases where victims have elected to receive compensation directly from the federal government:

> **A waiver of the attachment provision would seem appropriate for final and pending cases identified in subsection (a)(2) [of Section 2002]. In these cases, *judicial attachment is not necessary* because the executive branch will appropriately pay compensatory damages to the victims and used blocked assets to collect funds from terrorist states.**

H.R. Rep. 106-939, at 118 (2000) (emphasis added).

Furthermore, in a notice entitled "Payments to Persons who Hold Certain Judgments against Cuba or Iran," the OFAC published the following opinion:

> **Virtually all Iranian or Cuban property within the jurisdiction of the United States is 'property with respect to which financial transactions are prohibited or regulated' pursuant to IEEPA. . . . Section 2002(a)(2)(D) [of the Victim's Protection Act] therefore prohibits an applicant who elects the 100 percent option from seeking to execute his or her punitive damages award against, or from seeking to attach, virtually all Iranian or Cuban assets within the jurisdiction of the United States.**

65 FR 70382, 70384 (Nov 22, 2000). This opinion is based on OFAC's interpretation of the IEEPA, (a statute under which it exercises rulemaking authority) and one of its own regulations (31 C.F.R. § 535.311 ("Property; Property Interests")). This Court, therefore, owes OFAC's interpretation a high degree of deference. *See, e.g., Consarc Corp. v. United States Dept. of Treasury Office of Foreign Assets Control,* 315 U.S. App. D.C. 201, 71 F.3d 909, 914 (D.C. Cir. 1995) (stating that an OFAC interpretation of IEEPA controls unless the party challenging the interpretation "demonstrate[s] that the statute clearly forbids the agency's interpretation or that the interpretation is unreasonable."); 71 F.3d at 915 (stating that OFAC's interpretations of its own regulations are entitled to "an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation."). Accordingly, the Court finds that by electing to

receive 100% of his compensatory damages pursuant to Section 2002(a)(1)(B) of the Victims Protection Act, Flatow has relinquished his right to attach the MOD's judgment.[8]

This settles the issue with regard to Flatow's lien. Mr. Elahi, however, has not received compensation under the Victim' Protection Act. Thus, the validity of Elahi's lien turns on the question of whether the MOD's judgment is immunized from attachment by the FSIA.

(C) Whether the MOD's judgment is Exempt from Attachment as "Property of Military Character" Pursuant to Section 1611(b)(2) of the FSIA

The MOD argues that its judgment is immune from attachment because it is "property of military character" pursuant to Section 1611 of the FSIA (28 U.S.C. § 1611(b)). Section 1611(b) of Title 28 provides:

> **(b) Notwithstanding the provisions of section 1610 of this chapter [which waives foreign sovereign immunity under several enumerated circumstances] the property of a foreign state shall be**

---

[8] This Court is not the first to reach this conclusion. *See Flatow v. Islamic Republic of Iran*, 201 F.R.D. 5, 10 (D.D.C. June 5, 2001) (holding that through his exercise of the payment options contained in Section 2002(a)(1)(B), Flatow relinquished his right to "attach property that is regulated by the IEEPA. . . .")

immune from attachment and execution if . . .

> **(2) the property is, or is intended to be used in connection with a military activity and**
>
> **(a) is of military character; or**
>
> **(b) is under the control of a military or defense agency**

The MOD maintains that "it is impossible to conceive of anything more military than an Air Combat Maneuvering Range." Pet'r's Br. at 20. True, but the ACMR is not the property at issue before this Court. The property at issue is a judgment confirming an arbitration award in the MOD's favor, arising out of Cubic's breach of the ACMR contract. While the 1977 contract between Cubic and the MOD was of military character, the money award – confirmed in this Court 21 years after Cubic's breach – is not of military character. The legislative history clearly supports this conclusion. "Property is of military character if it consists of *equipment* in the broad sense – such as weapons, ammunition, military transport, warships, tanks, communications equipment." H.R. Rep. 94-1487 at 6630 (1976) (emphasis added). Money is not equipment.

Moreover, the statute states that only property that "*is,* or *is intended to be* used in connection with a military activity," qualifies as "property of military character." 28 U.S.C. § 1611 (emphasis added). *Present* or *future* intended use – not a prior intended use

that never came to fruition – determines the military character of the property at issue. *See* H.R. Rep. 94-1487 at 6630 (stating "property will be immune only if its *present or future* use is military. . . ." (emphasis added)). The MOD has admitted, in its motions and in expert reports relating to Iranian banking policies, that if it ever manages to obtain the money at stake, the money will revert to the Central Bank of Iran. The judgment at issue is not presently being used in connection with a military activity, nor, apparently, will the money be used for future military activities. Thus, a plain reading of the text of Section 1611(b) indicates that the MOD's judgment is not immune from attachment under this section.

The MOD contends that "[t]he overriding consideration of the United States policy expressed in 28 U.S.C. § 1611 is to *facilitate purchase of military equipment* developed and manufactured in the United States. . . ." Pet'r's Br. at 21 (emphasis added). The Court agrees. Iran, however, is not a nation to whom the United States sells arms. Indeed, selling arms to Iran is a criminal violation under the IEEPA and can result in up to 10 years imprisonment. *See* 50 U.S.C. § 1705 ("Penalties"). Therefore, the U.S. policy in favor of facilitating the foreign purchase of military equipment will suffer no harm if victims of terrorism are permitted to attach the MOD's judgment. To the contrary, allowing attachment would further the strong policy – embodied in the Victims Protection Act – of aiding victims' access to foreign assets. Accordingly, the Court rejects the MOD's argument that its

judgment against Cubic is immune from attachment as property of military character.

(D) Whether the MOD's judgment is Exempt from Attachment as "Property of a Central Bank" Pursuant to Section 1611(b)(1) of the FSIA

As an alternative to its property of military character argument, the MOD contends that its judgment is immune from attachment because it is the property of a central bank. Section 1611(b)(1) of Title 28 exempts from attachment property that is "of a central bank or monetary authority held for its own account. . . ." In support of its argument, the MOD has filed the expert opinion of Dr. Assadollah Karimi. Dr. Karimi's lengthy declaration details the workings of Iranian banking law. He asserts that, under Iranian law, the MOD's judgment is the property of the Central Bank of Iran. However, the laws of the United States – not Iranian law – control the inquiry whether the judgment of this Court is immune from attachment. Thus, the MOD's colloquy on the ins-and-outs of Iranian banking is irrelevant.

The judgment at issue is in favor of the MOD, not the Central Bank of Iran. And the MOD is the Iranian entity litigating the various matters relating to the MOD's judgment, both here and before the Ninth Circuit. If, as the MOD contends, the Central Bank of Iran owns the judgment, then why is the Central Bank not before the Court? How does the MOD have standing to seek a judicial determination concerning

property it claims not to own? Furthermore, elsewhere in its supporting documents the MOD states that "it cannot be argued that the Judgment is not under the agency or authority of the MOD. . . . It is an account that has been adjudicated by this Court to be in the name of MOD." Pet'r's Br. at 22. The Court agrees. Accordingly, the Court holds that the MOD's judgment is not the property of a central bank for purposes of 28 U.S.C. § 1611(b)(1).

(E) Whether the MOD's judgment is Immune from Attachment Pursuant to Presidential Determination No. 2001-03.

As previously discussed, Section 1610(f)(1)(a) of the FSIA permits the attachment of a wide array of foreign property in satisfaction of judgments held against state sponsors of terrorism. Section 1610(f)(1)(B)(3), however, empowers the President to waive the broad attachment provisions of 1610(f)(1)(A). *See* 28 U.S.C. § 1610(f)(1)(B)(3) ("The President may waive any provision of paragraph (1) in the interest of national security."). The very day that the Victim's Protection Act became law, President Clinton issued Presidential Determination No. 2001-03, waiving the attachment provisions of Section 1610(f)(1)(a). *See* Presidential Determination No. 2001-03, 65 FR 66483 (Oct. 28, 2000). Thus, Elahi may not rely upon Section 1610(f)(1)(a) to attach the MOD's judgment.

This does not settle the issue of attachment, however, for provisions of the FSIA other than Section 1610(f)(1)(a) may except the MOD's judgment from immunity from attachment. Elahi contends that attachment is permissible under either Section 1610(a)(7) or Section 1610(b)(2). The Court, however, sees no need to reach that question, for attachment is warranted on other grounds.[9]

The property at issue is special in character. It is a judgment debt arising from the confirmation of a foreign arbitration award. It is, therefore, the product of two acts on the part of the MOD, either of which is sufficient to establish a voluntary waiver of general jurisdictional immunity. First, the MOD submitted to

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[9] Whether the MOD's judgment may be attached pursuant to Section 1610(a)(7) or 1610(b)(2) turns on the question whether the judgment is property "used for a commercial activity in the United States. . . ." 28 U.S.C. § 1610(a)(7) or whether Iran or the MOD is currently "engaged in a commercial activity in the United States. . . ." 28 U.S.C. § 1610(b)(2). It is clear that contracting to purchase military goods is a "commercial activity" for purposes of the FSIA. *See* H. Rep. No 94-1487 at 6615 (stating that "a contract by a foreign government to buy . . . equipment for its armed forces . . . is a commercial activity."). Whether the MOD's judgment, arising out of an arbitration award obtained in satisfaction for the breach of a military sales contract, qualifies as property "used for a commercial activity" is a thornier question. *See, e.g., Flatow v. Islamic Republic of Iran*, 76 F.Supp.2d 16, 24 (D.D.C.1999) (discussing whether permitting attachment of a bank account under Section 1610(a)(7)'s "commercial activity exception' would render superfluous Congress" enactment of Section 1610(f)(1)(a)). Because the nature of the property at issue gives rise to alternative grounds for attachment, the Court is not compelled to reach this question.

ICC arbitration in Switzerland. *See* 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in which the foreign state has waived its immunity either explicitly or by implication. . . ."); *ENC Corp.*, 309 F.3d 1143 at 1149, 2002 WL 31429850 (stating that Section 1605(a)(1)'s implied waiver exception is triggered when a foreign state agrees to arbitration in another country) (page references unavailable); *Ipitrade Int'l v. Federal Republic of Nigeria,* 465 F. Supp. 824, 826 (D.D.C. 1978) (stating that submitting to arbitration under ICC rules constitutes an implicit waiver of sovereign immunity). Second, the MOD sought confirmation of the arbitration award in this Court. *See Joseph v. Office of the Consulate General of Nigeria,* 830 F.2d 1018, 1021 (9th Cir. 1987) (stating that filing pleadings in federal court without raising the issue of sovereign immunity is an implicit waiver under Section 1605(a)(1)).

The MOD never could have obtained the judgment against Cubic without lowering the shield of sovereign immunity. Reason dictates that it cannot now raise the shield to protect the judgment. Statute dictates the same result. Section 1609 of the FSIA states:

> ***Subject to existing international agreements to which the United States is a party at the time of enactment of this Act*** **the property in the United States of a foreign state shall be immune from attachment arrest and execution . . .**

28 U.S.C. § 1609 (emphasis added). One such "existing international agreement" is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (codified at 9 U.S.C. §§ 201-208 and known as the "New York Convention").[10] The MOD relied upon the New York Convention when it petitioned the Court to confirm the ICC arbitration award in 1998.[11] *See* The MOD's "Petition for Order Confirming Foreign Arbitral Award [9 U.S.C.S. § 207]" (Doc. No. 1 filed 25, 1998). To the extent that they do not conflict with terms of the Convention, the general arbitration provisions of Title 9 apply to proceedings brought under 9 U.S.C. § 201 *et seq.* *See* 9 U.S.C. § 208.

Among the general provisions is 9 U.S.C. § 13. Section 13 states:

> **The judgment [confirming an arbitration award] . . . shall have the same force and effect, in all respects, as, *and be subject to all the provisions of law relating to, a judgment* in an action [in federal court]; and it may be enforced**

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[10] The United States ratified the New York Convention in 1970. The FSIA was not enacted until 4 years later.

[11] Iran is not a party to the New York Convention. However, Switzerland – the nation in which the ICC arbitration took place – is a party. The MOD invoked Switzerland's party status to petition the Court to confirm the award pursuant to the provisions of the New York Convention. *See* The MOD's "Petition for Order Confirming Foreign Arbitral Award [9 U.S.C.S. § 207]" (Doc. No. 1 filed [sic] 25, 1998).

as if entered in an action in the court in which it is entered.

9 U.S.C. § 13 (emphasis added). The MOD's Judgment, therefore, is subject to all of the provisions of law that apply to other federal district court judgments. Among these provisions is Federal Rule of Civil Procedure 64, which permits the attachment and garnishment of a debtor's property by judgment creditors such as Elahi. *See* Fed.R.Civ.P. 64. Accordingly, the Court holds that Elahi's lien against the MOD's judgment is valid and enforceable.

V. CONCLUSION

(A) The Court holds that the MOD's judgment is property regulated pursuant to the IEEPA. Therefore, Stephen Flatow relinquished his right to attach the MOD's judgment by exercising Option (B) of Section 2002(a)(1) of the Victims Protection Act. Accordingly, the Court GRANTS Petitioner's "Motion for Judicial Determination That its Judgment Against Cubic Defense Systems Is Immune from Attachment or Execution by Stephen M. Flatow" and ORDERED the Clerk to STRIKE the notice of lien filed by Mr. Flatow on April 6, 1999.[12]

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[12] Despite Mr. Flatow's arguments to the contrary, *see* Flatow's Mem. in Opp. at 16, the action taken today in no way effects the validity of the writ of garnishment issued by the Eastern District of Virginia on December 21, 1998. The writ extends to *all* Iranian property that Cubic may possess. Today,

(Continued on following page)

(B) The Court holds that the MOD's Judgment is not immune from attachment of execution by Mr. Elahi. Therefore, the Petitioner's "Motion for Judicial Determination That it's Judgment Against Cubic Defense Systems Is Immune from Attachment or Execution by Dariush Elahi" is DENIED.

IT IS SO ORDERED.

DATED: 11-26-02

Rudi M. Brewster

UNITED STATES SENIOR DISTRICT JUDGE

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the Court holds merely that Mr. Flatow may not attach *this Court's* judgment of December 8, 1998.

UNITED STATES PUBLIC LAWS
106th Congress – Second Session
Convening January 24, 2000

PL 106-386 (HR 3244)
October 28, 2000
VICTIMS OF TRAFFICKING
AND VIOLENCE PROTECTION ACT OF 2000

An Act To combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, to reauthorize certain Federal programs to prevent violence against women, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

SEC. 2002. PAYMENT OF CERTAIN ANTI-TERRORISM JUDGMENTS.

(a) PAYMENTS. –

(1) IN GENERAL. – Subject to subsections (b) and (c), the Secretary of the Treasury shall pay each person described in paragraph (2), at the person's election –

(A) 110 percent of compensatory damages awarded by judgment of a court on a claim or claims brought by the person under section 1605(a)(7) of title 28, United States Code, plus amounts necessary to pay post-judgment interest under section 1961 of such title, and, in the case of a claim or claims against Cuba, amounts awarded as sanctions by judicial

order on April 18, 2000 (as corrected on June 2, 2000), subject to final appellate review of that order; or

(B) 100 percent of the compensatory damages awarded by judgment of a court on a claim or claims brought by the person under section 1605(a)(7) of title 28, United States Code, plus amounts necessary to pay post-judgment interest, as provided in section 1961 of such title, and, in the case of a claim or claims against Cuba, amounts awarded as sanctions by judicial order on April 18, 2000 (as corrected June 2, 2000), subject to final appellate review of that order.

Payments under this subsection shall be made promptly upon request.

(2) PERSONS COVERED. – A person described in this paragraph is a person who –

(A)(i) as of July 20, 2000, held a final judgment for a claim or claims brought under section 1605(a)(7) of title 28, United States Code, against Iran or Cuba, or the right to payment of an amount awarded as a judicial sanction with respect to such claim or claims; or

(ii) filed a suit under such section 1605(a)(7) on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000;

(B) relinquishes all claims and rights to compensatory damages and amounts awarded as judicial sanctions under such judgments;

(C) in the case of payment under paragraph (1)(A), relinquishes all rights and claims to punitive damages awarded in connection with such claim or claims; and

(D) in the case of payment under paragraph (1)(B), relinquishes all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to section 1610(f)(1)(A) of title 28, United States Code.

(b) FUNDING OF AMOUNTS. –

(1) JUDGMENTS AGAINST CUBA. – For purposes of funding the payments under subsection (a) in the case of judgments and sanctions entered against the Government of Cuba or Cuban entities, the President shall vest and liquidate up to and not exceeding the amount of property of the Government of Cuba and sanctioned entities in the United States or any commonwealth, territory, or possession thereof that has been blocked pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, or regulation issued thereunder. For the purposes of paying amounts for judicial sanctions, payment shall be made from funds or accounts subject to sanctions as of April 18, 2000, or from blocked assets of the Government of Cuba.

(2) JUDGMENTS AGAINST IRAN. – For purposes of funding payments under subsection (a) in the case of judgments against Iran, the Secretary of the Treasury shall make such payments from amounts paid and liquidated from–

(A) rental proceeds accrued on the date of the enactment of this Act from Iranian diplomatic and consular property located in the United States; and

(B) funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program account within the Foreign Military Sales Fund on the date of the enactment of this Act.

(c) SUBROGATION. – Upon payment under subsection (a) with respect to payments in connection with a Foreign Military Sales Program account, the United States shall be fully subrogated, to the extent of the payments, to all rights of the person paid under that subsection against the debtor foreign state. The President shall pursue these subrogated rights as claims or offsets of the United States in appropriate ways, including any negotiation process which precedes the normalization of relations between the foreign state designated as a state sponsor of terrorism and the United States, except that no funds shall be paid to Iran, or released to Iran, from property blocked under the International Emergency Economic Powers Act or from the Foreign Military Sales Fund, until such subrogated claims have been dealt with to the satisfaction of the United States.

(d) SENSE OF THE CONGRESS. – It is the sense of the Congress that the President should not normalize relations between the United States and Iran until the claims subrogated have been dealt with to the satisfaction of the United States.

(e) REAFFIRMATION OF AUTHORITY. – Congress reaffirms the President's statutory authority to manage and, where appropriate and consistent with the national interest, vest foreign assets located in the United States for the purposes, among other things, of assisting and, where appropriate, making payments to victims of terrorism.

(f) AMENDMENTS. –

(1) Section 1610(f) of title 28, United States Code, is amended –

(A) in paragraphs (2)(A) and (2)(B)(ii), by striking "shall" each place it appears and inserting "should make every effort to"; and

(B) by adding at the end the following new paragraph:

"(3) WAIVER. – The President may waive any provision of paragraph (1) in the interest of national security.".

(2) Subsections (b) and (d) of section 117 of the Treasury Department Appropriations Act, 1999 (as contained in section 101(h) of Public Law 105-277) are repealed.

* * *

UNITED STATES PUBLIC LAWS
107th Congress – Second Session
Convening January, 2002

PL 107-297 (HR 3210)
November 26, 2002
TERRORISM RISK INSURANCE ACT OF 2002

An Act To ensure the continued financial capacity of insurers to provide coverage for risks from terrorism.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL. – Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER. –

(1) IN GENERAL. – Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION. – A waiver under this subsection shall not apply to –

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(c) SPECIAL RULE FOR CASES AGAINST IRAN. – Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106-386; 114 Stat. 1542), as amended by section 686 of Public Law 107-228, is further amended –

(1) in subsection (a)(2)(A)(ii), by striking "July 27, 2000, or January 16, 2002" and inserting "July 27,

2000, any other date before October 28, 2000, or January 16, 2002";

(2) in subsection (b)(2)(B), by inserting after "the date of enactment of this Act" the following: "(less amounts therein as to which the United States has an interest in subrogation pursuant to subsection (c) arising prior to the date of entry of the judgment or judgments to be satisfied in whole or in part hereunder)";

(3) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(4) by inserting after subsection (c) the following new subsection (d):

"(d) DISTRIBUTION OF ACCOUNT BALANCES AND PROCEEDS INADEQUATE TO SATISFY FULL AMOUNT OF COMPENSATORY AWARDS AGAINST IRAN. –

"(1) PRIOR JUDGMENTS. –

"(A) IN GENERAL. – In the event that the Secretary determines that 90 percent of the amounts available to be paid under subsection (b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of the date of the enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran, the Secretary shall, not later than 60 days after such date, make payment from such amounts available to be paid under subsection (b)(2) to each party to which such a judgment has been issued in an amount equal

to a share, calculated under subparagraph (B), of 90 percent of the amounts available to be paid under subsection (b)(2) that have not been subrogated to the United States under this Act as of the date of enactment of this subsection.

"(B) CALCULATION OF PAYMENTS. – The share that is payable to a person under subparagraph (A), including any person issued a final judgment as of the date of enactment of this subsection in a suit filed on a date added by the amendment made by section 686 of Public Law 107-228, shall be equal to the proportion that the amount of unpaid compensatory damages awarded in a final judgment issued to that person bears to the total amount of all unpaid compensatory damages awarded to all persons to whom such judgments have been issued as of the date of enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran.

"(2) SUBSEQUENT JUDGMENT. –

"(A) IN GENERAL. – The Secretary shall pay to any person awarded a final judgment after the date of enactment of this subsection, in the case filed on January 16, 2002, and identified in subsection (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraph (1). The Secretary shall make such payment not later than 30 days after such judgment is awarded.

"(B) CALCULATION OF PAYMENTS. – To the extent that funds are available, the amount paid under subparagraph (A) to such person shall be the amount the person would have been paid under paragraph (1) if the person had been awarded the judgment prior to the date of enactment of this subsection.

"(3) ADDITIONAL PAYMENTS. –

"(A) IN GENERAL. – Not later than 30 days after the disbursement of all payments under paragraphs (1) and (2), the Secretary shall make an additional payment to each person who received a payment under paragraph (1) or (2) in an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraphs (1) and (2).

"(B) CALCULATION OF PAYMENTS. – The share payable under subparagraph (A) to each such person shall be equal to the proportion that the amount of compensatory damages awarded that person bears to the total amount of all compensatory damages awarded to all persons who received a payment under paragraph (1) or (2).

"(4) STATUTORY CONSTRUCTION. – Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise

available under this section or under any other provision of law.

"(5) CERTAIN RIGHTS AND CLAIMS NOT RELINQUISHED. – Any person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall not be required to make the election set forth in subsection (a)(2)(B) or, with respect to subsection (a)(2)(D), the election relating to relinquishment of any right to execute or attach property that is subject to section 1610(f)(1)(A) of title 28, United States Code, except that such person shall be required to relinquish rights set forth –

"(A) in subsection (a)(2)(C); and

"(B) in subsection (a)(2)(D) with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

"(6) GUIDELINES FOR ESTABLISHING CLAIMS OF A RIGHT TO PAYMENT. – The Secretary may promulgate reasonable guidelines through which any person claiming a right to payment under this section may inform the Secretary of the basis for such claim, including by submitting a certified copy of the final judgment under which such right is claimed and by providing commercially reasonable payment instructions. The Secretary shall take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section.".

(d) DEFINITIONS. – In this section, the following definitions shall apply:

(1) ACT OF TERRORISM. – The term "act of terrorism" means –

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET. – The term "blocked asset" means –

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that –

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY. – The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY. – The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

* * *

OPPOSITION BRIEF

No. 07-615

FILED
JAN 8 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Has Petitioner presented any compelling reasons to grant its petition where the Ninth Circuit's opinion below addresses a unique set of facts that does not implicate any significant area of controversy involving foreign sovereign immunity, raises no important question of law appropriate for Supreme Court review, and is not in conflict with a decision of this Court or a court of appeals?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Dariush Elahi, respectfully opposes the petition for writ of certiorari of the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD") because the decision below of the Ninth Circuit raises no important question of law appropriate for Supreme Court review, is consistent with the decisions of other circuit courts, and, in any event, was correctly decided. In sum, the petition is nothing more than a classic request for error correction that satisfies none of the criteria governing review by this Court. See Sup.Ct.R. 10. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

Elahi's Judgment Against Iran and MOIS

On October 23, 1990, Cyrus Elahi, a United States national, was assassinated by agents of the Islamic Republic of Iran ("Iran") and the Iranian Ministry of Information and Security ("MOIS"). *Elahi v. Islamic Republic of Iran*, 124 F. Supp.2d 97, 99, 105 (D.D.C. 2000). Cyrus Elahi was targeted by Iran for this act of state sponsored terrorism because he had become a vocal and effective advocate for a "free and democratic Iran" and, as a consequence, represented a threat to the Iranian clerical regime. *Id.* at 103.

In order to obtain redress for the brutal murder of Cyrus Elahi and in furtherance of the goals of the

United States government to combat and eliminate international terrorism, Dariush Elahi, a naturalized United States citizen and administrator of his brother's estate, filed suit against Iran in the United States District Court for the District of Columbia. 124 F. Supp.2d at 99. Suit was filed pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, Tit. II, §221(a), 110 Stat. 1241, codified at 28 U.S.C. § 1605 *et seq.* ("Antiterrorism Act"). The Act creates an exception to foreign sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA") and authorizes a judicial forum against state sponsors of terrorism, such as Iran. See 28 U.S.C. § 1605(a)(7).[1] Both Iran and the MOIS were properly served pursuant to the statute. Neither party entered an appearance or responded to the lawsuit, however. *Id.*

Prior to obtaining a judgment for damages against Iran and MOIS, Dariush Elahi, over the course of a two-day hearing, presented evidence satisfactory to the district court establishing the liability of Iran and MOIS for the murder of Cyrus Elahi. 124 F. Supp.2d at 100.[2] After hearing this

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[1] Iran has been designated a state sponsor of terrorism by the United States Department of State. See 49 Fed. Reg. 47702 (Dec. 6, 1984).

[2] Before a court may enter a default judgment against a foreign state, the FSIA requires that the plaintiff "establish [] his claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. § 1608(e).

(Continued on following page)

evidence, the court "engaged in a systematic review of the evidence . . . and the legal issues raised" and issued a detailed opinion setting forth the basis for its ruling that both Iran and MOIS were responsible for the assassination of Cyrus Elahi. *Id.* The district court entered a judgment on December 20, 2000 in favor of Dariush Elahi against Iran and MOIS, jointly and severally, for $11,740,035 in compensatory damages and against MOIS for $300,000,000 in punitive damages. *Id.* at 115.

Elahi's Attachment of the Cubic Judgment

Subsequently, on November 1, 2001, Dariush Elahi registered his judgment in the United States District Court for the Southern District of California and filed a notice of lien in the amount of his compensatory damages award against any distribution of a judgment in favor of MOD. App. 86. That judgment ("the Cubic judgment") confirms an International Chamber of Commerce ("ICC") arbitration award in favor of MOD and against Cubic Defense Systems, Inc. ("Cubic") for approximately $2.8 million. *Ministry of Defense and Support for the Armed Forces of the*

The evidence presented at the court hearing in Mr. Elahi's case included testimony by experts on Iran's support of international terrorism and information from the French judicial authorities, who investigated Cyrus Elahi's assassination and obtained the conviction of several Iranian nationals for having engaged in the conspiracy to assassinate Cyrus Elahi and others. 124 F. Supp.2d at 101-105.

Islamic Republic of Iran v. Cubic Defense Systems, Inc. ("*MOD v. Cubic*"), 29 F. Supp.2d 1168 (S.D. Cal. 1998).

The dispute that resulted in the Cubic judgment arose out of two contracts entered into in October, 1977 by Cubic and MOD's predecessor. The contracts involved Cubic's sale and service of an Air Combat Maneuvering Range ("ACMR") for use by the Iranian Air Force. *MOD v. Cubic*, 29 F. Supp. at 1170. MOD made a partial payment on the ACMR, but following the Iranian revolution in 1979, the delivery of the ACMR to MOD did not take place for reasons disputed by MOD and Cubic. In 1991, MOD filed a request for arbitration against Cubic with the ICC. Following the submissions of the parties, the ICC issued a final award in favor of MOD and against Cubic. In June, 1998, MOD filed a petition in the U.S. District Court of the Southern District of California to confirm the ICC award. On December 7, 1998, the district court granted MOD's petition and confirmed the award. *Id.* at 1174.

Both Cubic and MOD took cross-appeals of the district court's order. These appeals presently are pending before the Ninth Circuit. In the interim, Cubic has posted a bond to secure the judgment against it. App. 83.

On September 13, 2002, MOD filed in the district court for the Southern District of California a "Motion for a Judicial Determination that Its Judgment Against Cubic Defense Systems Is Immune from

Attachment or Execution by Dariush Elahi." App. 86. On November 26, 2002, the district court denied MOD's motion and upheld the validity of Mr. Elahi's lien. See *MOD v. Cubic,* 236 F. Supp.2d 1140 (S.D. Cal. 2002), reprinted at App. 81.

Ninth Circuit's First Decision and Supreme Court Remand

Subsequently, MOD appealed to the Ninth Circuit Court of Appeals the district court's ruling denying MOD's motion. On October 7, 2004, the court of appeals affirmed the district court's decision that the Cubic judgment is subject to attachment by Mr. Elahi. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206 (9th Cir. 2004), reprinted at App. 38. The Ninth Circuit concluded that the Cubic judgment was subject to attachment by Mr. Elahi pursuant to Section 1610(b)(2) of the FSIA, 28 U.S.C. § 1610(b)(2). This statutory provision allows for the attachment of property of an "agency or instrumentality of a foreign state . . . engaged in commercial activity in the United States" where the claim is one for which the agency or instrumentality is not immune by virtue of certain statutory provisions, including FSIA Section 1605(a)(7), the statutory provision pursuant to which Mr. Elahi obtained his judgment. App. 64-65.

MOD appealed to the United States Supreme Court, which granted *certiorari* on the limited question of whether MOD constituted an agency or instrumentality of a foreign state, rather than a foreign state itself. See *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 126 S.Ct. 1193, 1194 (2006) (*per curiam*). Finding that the Ninth Circuit had not specifically determined that MOD was an agency or instrumentality of Iran, the Supreme Court remanded the matter for further consideration. 126 S.Ct. at 1195.

Ninth Circuit's Second Decision on Remand

On remand, the Ninth Circuit requested two rounds of supplemental briefing and permitted the United States to appear as *amicus curiae*. This supplemental briefing addressed two additional issues that had not been considered by the Ninth Circuit in its earlier opinion. App. 9-10.

The first issue concerned the effect of Mr. Elahi's receipt of approximately $2.3 million from the United States Treasury in partial satisfaction of his compensatory damages award against Iran and MOIS. Mr. Elahi became eligible for this payment pursuant to an amendment to the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)(2)(D) (as amended by the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(c)(4), 116 Stat. 2322, 2337). This

amendment directed the Secretary of the Treasury to make pro rata, partial payments of compensatory damage awards to certain judgment creditors of Iran who had filed suit before October 28, 2000 based on claims of state-sponsored terrorism. This category of judgment creditors included Mr. Elahi. App. 11-12. In receiving partial payment of his compensatory damage award, the statute required that Mr. Elahi agree to relinquish, *inter alia*, his right to "execute against or attach property that is at issue in claims against the United States before an international tribunal." See App. 10.

In the Ninth Circuit remand proceedings, both MOD and the United States argued that by accepting partial payment from the Secretary of Treasury, Mr. Elahi had waived his right to attach the Cubic judgment because the judgment purportedly is "at issue" in Claim B/61 brought by Iran against the United States before the Iran-U.S. Claims Tribunal (the "Tribunal") in the Hague. The Tribunal was created by mutual agreement of Iran and the United States as part of the Algiers Accords.[3] The Tribunal has

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[3] The Algiers Accords, which were signed on January 19, 1981, resolved various disputes between Iran and the United States, including the release of the American hostages at the U.S. Embassy in Tehran. The main commitments of the Algiers Accords were (1) the release by Iran of the American hostages and (2) the agreement by the United States to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." App. 13, n. 4, quoting

(Continued on following page)

jurisdiction only over claims brought against the United States or Iran and counterclaims arising from the same transactions. App. 7.[4] In Claim B/61, Iran asserts that the United States violated the Algiers Accords by failing to restore certain frozen Iranian assets. App. 13.

The second additional issue involved Mr. Elahi's right to attach the Cubic judgment under Section 201(a) of the Terrorism Risk Insurance Act ("TRIA").[5] This statutory provision authorizes persons, like Mr. Elahi, with judgments "against a terrorist party," like Iran, to attach the "blocked assets" of that party. The statute defines the term "blocked asset," in relevant part, as being "any asset seized or frozen by the United States . . . under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701; 1702)." TRIA § 201(d)(2)(A). Both MOD and the United States argued that the Cubic

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General Declaration, General Principles, A at 1, available at http://www.iusct.org/general-declaration.pdf.

[4] Specifically, the Tribunal hears the following disputes: (1) claims brought by nationals of one state against the government of the other, and related counterclaims; (2) intergovernmental claims arising out of contracts for the purchase and sale of goods and services; and (3) intergovernmental claims regarding the interpretation of the Algiers Accords. App. 7.

[5] In the earlier Ninth Circuit proceedings, Mr. Elahi had argued that he had the right to attach the Cubic judgment pursuant to Section 201(a) of the TRIA. In its first decision, the circuit court did not consider this argument due to its determination that the Cubic judgment was subject to attachment pursuant to Section 1610(b)(2) of the FSIA. App. 66.

judgment did not constitute a "blocked asset" under this definition.

On May 30, 2007, the Ninth Circuit issued its opinion in the case and upheld the validity of Mr. Elahi's lien. In doing so, the appeals court first held that Mr. Elahi had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. Treasury because the judgment was not "at issue" in claims before an international tribunal. See App. 11-14. The Ninth Circuit reasoned that the Cubic judgment is not "at issue" in the Iran-U.S. Claims Tribunal by contrasting Cubic's contractual obligations to MOD, which were the subject of the ICC arbitration proceeding (and the subsequent district court judgment), and the United States' obligations to Iran, which are in the process of being addressed by the Tribunal. In doing so, the Ninth Circuit distinguished several decisions from other circuits involving attempts by the Hegna family, who are judgment creditors of Iran, to attach specific Iranian diplomatic or consular real properties, which indisputably are the subject of pending claims before the Tribunal. App. 14, n. 6 (citing the *Hegna* cases).

The Ninth Circuit next held that the Cubic judgment is subject to attachment under Section 201(a) of the TRIA. See App. 15-20. The appeals court determined that the Cubic judgment is a "blocked asset," which may be attached under the TRIA because "it represents Iran's interest in an asset" that was frozen by the United States in 1979 and never has been unblocked. See App. 20. The Ninth Circuit

expressly distinguished two cases involving Iranian property that entered the United States after the signing of the Algiers Accords in 1981 and after the U.S. government ceased its blocking of Iranian assets. App. 4 (citing *Bank of New York v. Rubin*, 2006 U.S. Dist. LEXIS 10215 (S.D.N.Y. Mar. 15, 2006); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63 (E.D.N.Y. 2004)).[6]

Circuit Judge Raymond C. Fisher dissented from the panel's holding only with respect to whether Mr. Elahi had relinquished his right to attach the Cubic judgment. See App. 28-37. In his dissent, Judge Fisher expressed his view that the Cubic judgment is "at issue" before the Iran-U.S. Claims Tribunal because "the Tribunal must determine the effect of the judgment on the amount of liability owed by the United States" (App. 32) and, hence, that Mr. Elahi had waived his right to attach the judgment. See App. 37.

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[6] The appeals court further found that because there was no evidence that MOD is a separately constituted "legal entity" distinct from the Iranian state, MOD should be deemed an inherent part of the state of Iran. App. 25. Hence, the court ruled that the Cubic judgment was not subject to attachment under Section 1610(b) of the FSIA as being property of an "agency or instrumentality" of a foreign state. The court also determined that the Cubic judgment was not "used for a commercial activity in the United States" and, hence, is not subject to attachment under Section 1610(a) of the FSIA. See App. 27-28.

Following the issuance of the Ninth Circuit's decision, MOD filed a petition for rehearing and rehearing *en banc*, which was denied by the court on July 17, 2007 in an order that also made some minor amendments to its earlier opinion. App. 4. On November 9, 2007, MOD filed its petition for writ of certiorari requesting that this Court grant review.

REASONS FOR DENYING WRIT

I. THIS CASE ADDRESSES A UNIQUE SET OF FACTS AND DOES NOT INVOLVE ANY MAJOR AREA OF CONTROVERSY UNDER THE FSIA.

Contrary to the argument of MOD, the Ninth Circuit's decision does not implicate to any degree "a major outstanding area of controversy in the application of foreign sovereign immunities." Petition at 13. MOD notes in its petition that a number of claimants have obtained judgments under FSIA Section 1605(a)(7) against state sponsors of terrorism (Petition at 15), but none of the other cases cited by MOD deal with circumstances similar to those addressed in the Ninth Circuit's opinion.

Rather, in this case, the Ninth Circuit dealt with a unique set of facts involving Mr. Elahi's attachment of a U.S. court judgment arising from a commercial transaction between MOD and a U.S. corporation. Whether this property, i.e., the Cubic judgment, is "at issue" before the Iran-U.S. Claims Tribunal is not a

matter of general applicability involving sovereign immunity. MOD has pointed to no similar case in which there is a dispute as to whether a U.S. court judgment in its favor is "at issue" before the Tribunal. Likewise, whether the Cubic judgment is subject to attachment as a "blocked asset" under the TRIA arises out of a specific set of circumstances which, again, do not broadly implicate foreign relations concerns. As far as Mr. Elahi is aware, there is no other judgment that MOD has obtained in a U.S. court that might be subject to attachment by a judgment creditor of Iran. In short, none of the issues dealt with by the Ninth Circuit are issues of general applicability under the FSIA.[7]

Just because the petitioner in this case is the ministry of defense of a foreign state does not automatically mean that the matter involves "significant foreign relations issues" (Petition at 16), which would warrant review by this Court. If it did, every time the ministry of a foreign state or a foreign state, itself, were involved in legal proceedings in circuit courts, this Court would be compelled to grant review of the

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[7] Although this Court recently has addressed issues involving the interpretation and application of the FSIA with respect to the appropriate standard for review of remand orders, *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S.Ct. 2411 (2007), and the immunity from property tax disputes of diplomatic buildings, *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352 (2007), the Ninth Circuit's decision in this case does not raise similar issues of general application under the FSIA.

lower court decision. Even a cursory review of this Court's rulings denying certiorari confirms that a lower court decision involving a foreign state or a foreign ministry does not always merit or warrant Supreme Court review.[8]

II. THE NINTH CIRCUIT'S HOLDING THAT THE CUBIC JUDGMENT IS NOT "AT ISSUE" IN THE U.S.-IRAN CLAIMS TRIBUNAL DOES NOT CONFLICT WITH ANY RULINGS OF OTHER CIRCUITS, AND, IN ANY EVENT, IS CORRECT.

A. The Ninth Circuit's Ruling Is Not in "Manifest Conflict" with the Rulings of Other Circuit Courts.

In its Petition, MOD erroneously asserts that the Ninth Circuit's decision is in "manifest conflict" with the rulings of "at least four other circuits." Petition at 22. The cases cited by MOD all involve attempts by the Hegna family, who are judgment creditors of Iran,

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[8] See, e.g., *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 474 U.S. 948 (1985); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 123 S.Ct. 341 (2002); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 464 U.S. 815 (1983); *Joseph v. Office of the Counselor Gen.*, 485 U.S. 905 (1988); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 464 U.S. 815 (1983); *Sun v. Taiwan*, 531 U.S. 979 (2002); *Jackson v. People's Republic of China*, 480 U.S. 917 (1987); *Texas Trading v. Nigeria*, 454 U.S. 1148 (1982).

to attach Iranian diplomatic and consular properties.[9] In each of these cases, which are all related and involve the same type of legal issues, the appeals court concluded that because Iran had filed claims against the United States in the Tribunal alleging that the U.S. had unlawfully "fail[ed] to grant Iran custody of its diplomatic and consular properties in the United States," the diplomatic property the Hegna family sought to attach was "at issue" before the Tribunal. See, e.g., *Hegna*, 376 F.3d at 435.

That the status and custody of Iranian diplomatic and consular properties may be "at issue" before the Tribunal certainly does not entail that the Cubic judgment enforcing an ICC arbitration award similarly is "at issue." The Cubic judgment, which enforces a commercial arbitration award, has none of the attributes of diplomatic or consular properties of the government of Iran. The two types of properties are totally separate and distinct.

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[9] See *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004) (holding that two condominium units that had served as Iranian consular residences was property "at issue before the tribunal"); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 (4th Cir. 2004), 235 (4th Cir. 2004) (former Iranian diplomatic properties were "at issue" before the claims tribunal); *Hegna v. Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492-93 (5th Cir. 2004). Because of the inter-related nature of these decisions, it is overstating to claim, as MOD does in its petition, that the Ninth Circuit's ruling conflicts with decisions of *four* circuits.

Moreover, contrary to MOD's contentions (Petition at 23), the Ninth Circuit did not utilize a different definition of the term "at issue" than the circuit court decisions involving the Hegna family. For example, in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004), the Fifth Circuit relied upon the definition of the term "at issue" as set forth in BLACK'S LAW DICTIONARY (8th ed. 2004) as being "under dispute" or "in question." This is the very same definition utilized by the Ninth Circuit in its analysis as to whether the Cubic judgment is at issue before the Tribunal. Like the Fifth Circuit in *Hegna*, the Ninth Circuit looked to the definition of "at issue" in BLACK'S LAW DICTIONARY and correctly concluded that the term "clearly means only those [properties] disputed before the Tribunal." App. 14, n. 7.

In sum, the Ninth Circuit's decision affirming Mr. Elahi's lien in no respect is in conflict with the decisions of those other circuit courts that have held that diplomatic and consular property are "at issue" before the Tribunal. MOD simply is attempting to create a split in the circuits where none exists. Because the Ninth Circuit's decision creates no conflict in the circuits, the ruling presents no issue that is worthy of Supreme Court review. At best, MOD is seeking error correction, and as set forth below, there is no error here.

B. The Ninth Circuit Correctly Held that the Cubic Judgment Is Not "At Issue" in the Tribunal Simply Because the United States May Obtain a Monetary Benefit.

MOD argues in its petition, as it did before the Ninth Circuit, that the Cubic judgment is "at issue" before the Tribunal because if "the Cubic judgment is repatriated to Iran, the United States stands to gain a benefit." Petition at 19. In a footnote to its pleadings in the Tribunal, Iran has stated its intention to "offset the proceeds from the ICC award (and, now, the Cubic judgment) from any potential liability that the United States has with respect to" Iran's Tribunal claims. Petition at 18-19.[10]

That the proceeds MOD expects to receive from the Cubic judgment may offset the amount the United States may owe Iran in the Claims Tribunal in Case B/61 does not render the Cubic judgment "at issue" in the Tribunal proceedings. As the Ninth Circuit panel noted, the plain meaning of the term "at issue" is "under dispute" or "in question." See App. 14, n. 7 (quoting BLACK'S LAW DICTIONARY (8th ed.

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[10] MOD's Petition at 19 states that the United States has acknowledged that "the awards due from Cubic under the ICC Award. . . . would be 'recouped from the remedies sought against the United States in case B61'." U.S. Rebuttal, Case B/61, at 24-25, n. 32 (filed Sept. 1, 2003). The U.S. Rebuttal referenced by MOD is not part of the record in this case, nor is it publicly available. Pleadings before the Tribunal are not publicly filed.

2004)). The Cubic judgment is neither "under dispute" nor "in question" in proceedings before the Tribunal, and MOD has not argued to the contrary.

Moreover, as the Ninth Circuit also noted, "the Tribunal has no jurisdiction over claims against private parties," and hence, MOD's claim against Cubic could not be brought in the Tribunal or be at issue there. See App. 13-14. Indeed, in January, 1982, MOD filed a claim against Cubic with the Iran-U.S. Claims Tribunal, and in April, 1987 the Tribunal issued an order stating that it had no jurisdiction over the matter. *MOD v. Cubic*, 29 F. Supp.2d at 1170.[11] Following the Tribunal ruling, MOD filed with the ICC its demand for arbitration against Cubic. Accordingly, the Ninth Circuit correctly found that "[h]aving arbitrated this dispute before the ICC and secured a judgment against Cubic for its breach, Iran has fully adjudicated its claim against Cubic," and hence, "the Cubic judgment is not 'at issue' before the Claims Tribunal." See App. 13-14. As the Ninth Circuit pointed out, MOD's interpretation of the definition of what may be "at issue" before the Tribunal "would embrace both properties as to which any

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[11] The district court's finding cited above was based upon MOD's statement in its Petition for Order Confirming Foreign Arbitration Award that it had filed a claim against Cubic Defense Systems, Inc. at the Iran-U.S. Claims Tribunal, but that "[o]n or about April 28, 1987, the Tribunal issued an order stating its lack of jurisdiction to hear the matter." See Decl. of Mina Almassi, Case No. 98-1165, Docket No. 1, ¶IX, at 4 (filed June 25, 1998).

dispute already has been resolved and those currently contested. 'At issue' clearly means only those disputed before the Tribunal." See App. 14, n. 7.[12]

C. The Ninth Circuit's Ruling Was Not Predicated Upon Any "False Premises."

In seeking review by this Court, MOD asserts that the Ninth Circuit's opinion was premised on the "false assumption" that in proceedings before the Iran-U.S. Claims Tribunal, Iran conceded that the Cubic judgment was not relevant or "not at issue" before the Tribunal. Petition at 16. MOD's argument is predicated upon a misreading of the appeals court's opinion.

Rather than proceeding upon any "false assumption" about what Iran asserted to the Tribunal, the Ninth Circuit correctly found that in filings with the Tribunal, Iran argued that the "subject matter of this case [Iran's claims against the United States in Case B/61]" is "at variance with the ICC [International

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[12] MOD also contends that the Ninth Circuit's decision raises "significant foreign relations concerns," but the only potential concern for the United States is a monetary one. If Cubic satisfies the judgment against it by paying Mr. Elahi, rather than MOD, Iran will not voluntarily offset the amount that it claims against the United States in Case B/61 by the amount of the Cubic judgment. Such a purely monetary concern cannot be said, as MOD asserts, to raise "sensitive issues concerning the foreign relations of the United States." Petition at 20, quoting *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

Chamber of Commerce] action" against Cubic. App. 12. As Iran explained in its briefing to the Tribunal in Case B/61:

> The ICC proceeding . . . cannot have *res judicata* effect on the present case. This is because the present [claim before the Hague] lack three identities (identity of object, identity of parties, and identity of subject matter) required for that purpose . . . The opposing party in this case is, obviously not a U.S. private company, but the United States government. The subject matter of this Case, *at variance with the ICC action,* is the losses suffered by Iran as a result of the United States' non-export of Iranian properties.

App. 91 (emphasis added).

MOD does not dispute that Iran made this argument to the Tribunal and took the position that the contract claim against Cubic is distinct from Iran's claims against the United States presently pending before the Tribunal. It was this "concession" by Iran that the Ninth Circuit found persuasive in deciding that "the Cubic judgment itself already adjudicated in the ICC action is not 'at issue' in Iran's claim" against the United States in the Tribunal. See App. 12-13. Hence, rather than predicating its ruling upon any "false premises," the Ninth Circuit relied upon Iran's specific statements to the Tribunal, and the appeals court correctly determined that there is a clear distinction between Iran's Tribunal claim in Case B/61 that the U.S. has violated the Algiers Accords and

MOD's contract claim against Cubic, which forms the basis for the Cubic judgment.

III. THE NINTH CIRCUIT'S RULING THAT THE CUBIC JUDGMENT IS A "BLOCKED ASSET" DOES NOT CONFLICT WITH OTHER COURT DECISIONS AND, IN ANY EVENT, IS CORRECT.

A. The Ninth Circuit's Decision Is Not in Conflict with Other Decisions Addressing the Term "Blocked Assets."

Contrary to MOD's arguments (Petition at 26-29), the Ninth Circuit's ruling that the Cubic judgment is a "blocked asset" subject to attachment under the TRIA does not conflict with decisions of other courts that have addressed the meaning of the term. Those court decisions dealt with property of a completely different nature than a federal court judgment, i.e., the Cubic judgment, that is the subject of this case.

MOD's petition seeks to portray the Ninth Circuit's decision as endorsing a broad construction of the term "blocked assets," while other courts have taken a "narrow construction" of the language. Petition at 29. Again, MOD is attempting to create a conflict in the courts where none exists. In its opinion, the Ninth Circuit clearly recognized that the definition of "blocked asset" is that contained in the TRIA itself, as meaning "any asset seized or frozen by the United States . . . under §§ 202 and 203 of the

International Emergency Economic Powers Act (50 U.S.C. §§ 1701, 1702)." TRIA § 201(d)(2)(A). See App. 16-17. The cases cited in MOD's petition at 27-29 all utilize the same definition of the term. See *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63, 65 (E.D.N.Y. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 493 n. 32 (5th Cir. 2004); *Weininger v. Castro*, 462 F. Supp.2d 457, 480 (S.D.N.Y. 2006); *Rubin v. Islamic Republic of Iran*, 456 F. Supp.2d 228, 235 (D. Mass. 2006); *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 269 (2d Cir. 2003).

As the cases cited by MOD highlight, the determination of whether certain property constitutes a "blocked asset" as that term is defined by the TRIA is an extremely fact specific one which requires the application of a complex web of regulations and executive orders governing the status of property of foreign states designated by the U.S. as state sponsors of terrorism. The legal analysis turns not only on the nature of the assets, but also on when and how the underlying property interests arose and the specific regulatory regime applicable to the terrorist state, which differs depending upon the country involved. Accordingly, the lower court decisions discussed by MOD (Petition at 26-29) reach varying results based upon their own specific set of facts and circumstances, rather than upon any disagreement as to the proper construction of the term "blocked assets," such as would warrant this Court's review.

For example, MOD cites to two cases in which the courts ruled that the TRIA did not permit the attachment of Iranian property because the assets at issue, i.e., bank accounts, did not fall within TRIA's definition of "blocked assets." Petition at 27-29, citing *Weinstein v. The Islamic Republic of Iran*, 299 F. Supp.2d 63 (E.D.N.Y. 2004); *Bank of New York v. Rubin*, 484 F.3d 149 (2nd Cir. 2007), aff'g, 2006 U.S. Dist. LEXIS 10215 (S.D.N.Y. Mar. 15, 2006). The bank accounts consisted of monies that Iran had transferred into the United States after January 19, 1981, the date the United States and Iran entered into the Algiers Accords. As the courts explained, Iranian property that has come within the jurisdiction of the United States after January 19, 1981 is regulated by a general license, but is not subject to U.S. blocking prohibitions. *Weinstein,* 299 F. Supp.2d at 67, citing Executive Order 12282, "Revocation of Prohibitions Against Transactions Involving Iran," 46 Fed. Reg. 7925 (Jan. 19, 1981); 31 C.F.R. § 535.579; *Bank of New York v. Rubin*, 2006 U.S. Dist. LEXIS 10215, *12 ("any funds that came into the Bank after that date [January 19, 1981] were therefore not blocked."), *aff'd,* 484 F.3d 149 (2nd Cir. 2007).[13] Thus,

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[13] Property within the United States prior to January 19, 1981, however, remains subject to blocking regulations that have been in place since November, 1979. See *Rubin*, 2006 U.S. Dist. LEXIS 10215, *9 ("Although property entering the United States after January 19, 1981 was not blocked, the blocking provision of § 535.201 was never repealed.").

in both *Weinstein* and *Rubin*, the courts concluded that the Iranian property was not blocked.

The Ninth Circuit's opinion below did not disagree with the legal analysis in either the *Weinstein* or *Bank of New York* decision. Rather, because the Ninth Circuit determined that Iran's interest in the ACRM arose prior to January 19, 1981, the court merely concluded that "the reasoning in those cases [cited by MOD] is inapplicable here." App. 4. Hence, contrary to MOD's contention, the Ninth Circuit's ruling creates no conflict with the decisions in *Bank of New York* and *Weinstein* as to the construction of the term "blocked assets."

MOD's attempt to create a circuit court conflict by citing the Fifth Circuit's decision in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004), similarly, is misplaced. Indeed, in *Hegna*, the Fifth Circuit found that the real property that had served as the residence of the general counsel of Iran is a "blocked asset," but is exempt from attachment under the TRIA because it constitutes property "subject to the Vienna convention on . . . consular relations" and was "used exclusively for diplomatic or consular purposes." 376 F.3d at 93-494, quoting TRIA § 201(d)(2)(B)(ii). There is no question that the property at issue in this case (the Cubic judgment) is not diplomatic or consular property, and there is nothing in the Fifth Circuit's *Hegna* decision to indicate that the Fifth Circuit was utilizing a "limited definition of 'blocked assets'" (Petition at 29) as MOD would have this Court believe. Hence, the Fifth Circuit's decision

is not in any manner "in tension" with the Ninth Circuit's holding.

MOD's citation to *Rubin v. Islamic Republic of Iran*, 456 F. Supp.2d 228, 236 (D. Mass. 2006) and *Weininger v. Castro*, 462 F. Supp.2d 457 (S.D.N.Y. 2006), also fails to support MOD's argument that other courts have adopted a narrower construction of the term "blocked assets" than that of the Ninth Circuit. Indeed, in *Rubin,* the district court concluded that the property in question (Iranian antiquities) "remained blocked" under executive order, and in *Weininger*, the court found there was "no dispute" that the property in question (third party bank accounts) fell within the definition of being a blocked asset.

Finally, although MOD's petition at 26 asserts that the Ninth Circuit's decision is in "substantial tension" with the ruling of the Second Circuit in *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003), such is not the case. In *Smith*, the Second Circuit found there to be "no dispute that the Iraqi assets at issue were 'blocked funds' within the meaning of TRIA 201(a)" and, hence, the decision neither considered nor discussed the appropriate definition of the term "blocked assets."[14] Accordingly,

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[14] Rather, the decision addressed the separate and unrelated issue of whether the president could confiscate the "blocked" Iraqi assets and transfer them to the newly-constituted government of Iraq. *Smith*, 346 F.3d at 272.

there can be no conflict or "tension" between the Second Circuit's ruling and the Ninth Circuit's decision below.

In short, the Ninth Circuit's ruling presents no conflict in the courts with respect to the application of the TRIA's definition of "blocked assets." In its petition, MOD merely is asking for error correction, and as set forth below, there is no error in the Ninth Circuit's ruling that the Cubic judgment is a "blocked asset" subject to attachment under Section 201(a) of the TRIA.

B. The Ninth Circuit Correctly Ruled that the Cubic Judgment Is a "Blocked Asset."

In its opinion, the Ninth Circuit unanimously concluded that the Cubic judgment constituted a "blocked asset" under the TRIA because it represents "Iran's interest in an asset" seized or frozen by the United States when following the Iranian hostage in November, 1979, President Carter exercised his authority under the International Emergency Economic Powers Act ("IEEPA") to freeze Iranian assets in the United States. App. 20.[15]

MOD's petition takes issue with the Ninth Circuit's conclusion because MOD argues that "[t]he

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[15] Circuit Judge Fisher did not disagree with the majority on the issue of whether the Cubic judgment constituted a "blocked asset." App. 28.

property being attached here is not the military equipment (the air combat maneuvering range) that was the subject of the underlying transaction between Cubic and MOD; rather, it is MOD's judgment against Cubic, which confirmed an arbitration award for breach of contract." Petition at 25 (emphasis in original). MOD's present argument, however, ignores the position it advanced before the Ninth Circuit that the Cubic judgment represents the "liquidation of a monetary amount of a military asset manufactured by Cubic and owned by MOD." Brief of Appellant at 31, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* No. 03-55015, filed April 10, 2003. Just because MOD's interest in the blocked military asset, i.e., the ACMR, was liquidated to a monetary amount, first, as a commercial arbitration award and, subsequently, as a federal court judgment does not mean that MOD's interest became unblocked.

President Carter's blocking order of November, 1979 remains in effect, and MOD's interest in the ACMR, now reduced to a monetary judgment, remains frozen. Although following the release of the American hostages, the United States unblocked certain Iranian assets and lifted the trade embargo, these actions did not unblock MOD's interests in the ACMR. As the Ninth Circuit explained in its opinion:

> . . . military goods such as the ACMR remained blocked. See 22 U.S.C. §§ 2751 et seq.; Exec. Order No. 12,1270, 44 Fed. Reg. 65729 (Nov. 14, 1979); Notice of President, 70

> Fed. Reg. 9039 (Nov. 9, 2005); International Traffic in Arms Regulations, 22 C.F.R. §§ 120-30; Office of Foreign Assets Control, Dep't. of Treas., Foreign Assets Control Regulations for Exporters and Importers 23 (2007) ("Certain assets related to these claims remain blocked in the United States and consist mainly of military and dual-use property").

App. 3.

Hence, the Cubic judgment, which represents the "liquidation of a monetary amount" of a blocked military asset (Brief of Appellant at 31, *supra*), likewise, remains blocked, notwithstanding the executive orders cited in MOD's petition.

C. The Ninth Circuit's Recent Decision Does Not Conflict with Its Prior Opinion.

Finally, MOD's petition at 23 accuses the Ninth Circuit of flip-flopping by holding that the Cubic judgment is a "blocked asset" subject to attachment when the court purportedly reached "the opposite conclusion in its earlier ruling." MOD's argument is without merit and is based upon a misreading of the Ninth Circuit opinions in this case.

In its ruling of October 7, 2004, which was vacated and remanded by this Court, the Ninth Circuit panel stated that "MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against

Cubic." App. at 76, citing *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp.2d 1168 (S.D. Cal. 1998). The circuit court's statement does not mention the term "blocked asset," nor did the court in its first opinion address Mr. Elahi's right to attach the Cubic judgment under the TRIA.[16] That issue was addressed only on remand. Hence, the Ninth Circuit did not engage in any flip-flopping whatsoever when in its second opinion, the appeals court held that the Cubic judgment is a "blocked asset" under the TRIA subject to attachment by Mr. Elahi.

IV. THE NINTH CIRCUIT'S DECISION DOES NOT UNDERMINE U.S. FOREIGN POLICY

As a final argument, MOD posits that "the Ninth Circuit's judgment, if left unreviewed, will vastly complicate the United States' foreign policy interests in regards to the Islamic Republic of Iran and compromise this country's obligations under the Algiers Accords." Petition at 30. Such speculation by MOD does not constitute a legitimate basis for this Court to grant review of the Ninth Circuit's decision, especially where, as set forth in Section I, *supra*, any potential effect of the appeals court's ruling on U.S.

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[16] As noted *supra*, n. 5, Mr. Elahi made the argument to the appeals court, but the court did not need to address attachment under the TRIA because the Court ruled that the Cubic judgment was subject to attachment on other grounds.

foreign policy would be particularly attenuated because the ruling below is a narrow one and the issue addressed, i.e., attachment of a U.S. federal court judgment in favor of the ministry of a terrorist nation by a judgment creditor of the terrorist state, is highly unlikely to recur in the future.

In proceedings before the Ninth Circuit, both MOD and the United States as *amicus curiae*, had occasion to address any foreign policy implications of the issues raised by Mr. Elahi's attachment of the Cubic judgment. There is no reason to believe, and MOD has offered none, that the Ninth Circuit failed to take into account any potential foreign policy implications of its decision. By granting the United States' motion to intervene as an *amicus curiae* and permitting the U.S. government to file briefs and to participate in oral argument, the Ninth Circuit evidenced its sensitivity to potential foreign policy concerns. MOD takes issue with the outcome of the Ninth Circuit's proceedings, but disagreement with the court's decision does not mean that U.S. foreign policy will be compromised by the appeals court ruling.

MOD's professed concern about the foreign policy ramifications of the Ninth Circuit's decision is at base nothing more than attack upon the very purpose and reason that Congress enacted the Antiterrorism Act allowing victims of state-sponsored terrorism to pursue court actions in the United States to obtain redress for terrorist acts. Mr. Elahi respectfully submits that this Court should not allow MOD to

place another roadblock in Mr. Elahi's attempt to obtain justice and some financial recompense against those who ordered the assassination of his brother for advocating democratic freedoms in Iran.

Indeed, to the extent that this Court may take into account the implications of the Ninth Circuit's decision and its impact upon the foreign relations of the United States, all of the policy reasons counsel in favor of denying certiorari. Congress' very purpose in passing the Antiterrorism Act was to allow victims of state sponsored terrorism or their relatives to obtain compensation for the wrongs perpetrated by terrorist states and, as a result, to deter terrorist nations in the future from engaging in and sponsoring terrorist acts. See *Elahi,* 124 F. Supp.2d at 113 ("One of the main purposes of the Antiterrorism Act is to provide victims of state sponsored terrorism (or . . . the next of kin and personal representative) 'an important economic and financial weapon against these outlaw states.'").

The need to deter international terrorism by rogue nations like Iran is as true today as it was in 1996, when Congress passed the Antiterrorism Act, and in December 2000, when Mr. Elahi obtained his district court judgment against Iran. According to the Department of State's most recent report on global terrorism, "Iran remained the most active state sponsor of terrorism. Its Islamic Revolutionary Guard Corps (IRGC) and Ministry of Intelligence and Security (MOIS) were directly involved in the planning and support of terrorist acts and continued to

exhort a variety of groups . . . to use terrorism to pursue their goals." United States Department of State, 2006 Country Reports on Terrorism (April 2007).

To accept the arguments of MOD and to allow MOD's money judgment against Cubic to be exempt from attachment under the TRIA would render hollow the judgment that Dariush Elahi obtained against Iran for the brutal assassination of his brother, and would frustrate the laudable goals of the Antiterrorism Act and of U.S. foreign policy in combating Iran's continuing support of terrorism.

CONCLUSION

MOD has failed to present any compelling reason for this Court to grant its petition. Therefore, Mr. Elahi respectfully requests that the petition be denied.

Respectfully submitted,

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January 8, 2008

REPLY BRIEF

(3)

No. 07-615

Supreme Court, U.S.
FILED
JAN 17 2008
OFFICE OF THE CLERK

81

In The Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Despite Respondent's argument in his Brief in Opposition ["Op. Cert."], the petition raises extraordinary questions of statutory construction, resulting in schisms of interpretation and application in the lower courts and causing substantial confusion in the conduct of U.S. foreign policy. Two distinct set of questions are raised here in relation to the 2000 Victims of Trafficking and Violence Protection Act (VTVPA) and the 2002 Terrorism Risk Insurance Act (TRIA), which even Respondent concedes, Op. Cert. 14, 21, 28-31, have been widely-litigated and implicate significant foreign policy concerns. These issues are worthy of this Court's consideration, either by way of summary disposition or grant of plenary review.

1. Whether Respondent had relinquished his right to attach the Cubic judgment, under the VTVPA and TRIA, by receiving U.S. Treasury payments in partial satisfaction of his default judgment, turns on whether the Cubic judgment is "at issue in claims against the United States before an international tribunal." TRIA, § 201(c)(4); Pet. App. 117. The panel majority and dissent sharply disagreed about the gloss to be given to the phrase "at issue," and its application to proceedings at the Iran-U.S. Claims Tribunal in The Hague. Pet. App. 11-15 & n.7, 31-37.

a. The circuit conflict Petitioner earlier discussed, Pet. 21-23, concerns the appropriate construction of the "at issue" provision. This split is not of Petitioner's fanciful creation; it was acknowledged by both the panel majority and dissent here. Pet. App. 14-

15 nn.6&7, 31-333 & n.7. Despite Respondent's contention, Op. Cert. 15, the court below most certainly did not adopt the Fifth Circuit's construction of "at issue" in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004), as covering a "broader swath of conflict." Id. at 492. The Ninth Circuit, instead, noted that "[t]he dissent reads Congress's choice of the phrase 'at issue' as cutting a broader swath than the phrase 'the subject of' resolved claims. However, that distinction is untenable." Pet. App. 15 n.7. There should be no doubt that the Ninth Circuit employed a narrowing construction of TRIA's "at issue" provision, in order to hold that the Cubic judgment was somehow not implicated in a claim against the United States at the Iran Claims Tribunal.

b. Respondent also asserts that because the Claims Tribunal has no jurisdiction over private parties, the Cubic judgment could never be "at issue" there. Op. Cert. 17. This misconstrues the Claims Tribunal's jurisdiction, and would have serious ramifications for the operation of that institution. The jurisdictional basis for the Islamic Republic of Iran's dispute with the United States in Case B/61, as concerning the Cubic judgment, is the United States' non-compliance with paragraphs 9 and 17 of the General Declaration of the Algiers Accords, Jan. 19, 1981, Iran-U.S., 20 I.L.M. 224, 227-28 (1981). Such disputes are clearly within the Tribunal's jurisdiction. See Claims Settlement Declaration, art. II, paras 2 & 3, reprinted in 20 I.L.M. at 231.

Because the court below misunderstood this aspect of the Tribunal's jurisdiction, and the nature of

the United States' obligations under the Algiers Accords, its and Respondent's (see Op. Cert. 19) ostensible reliance on Petitioner's statements at the Tribunal concerning the res judicata effect of the earlier Cubic arbitration are unavailing. As already discussed, see Pet. 18, Petitioner's position has been entirely consistent, given the different character of the proceedings before the Tribunal and the International Chamber of Commerce. Judge Fisher was thus quite right in observing below, see Pet. App. 37, that Petitioner made no "concession" here.

c. Respondent's contentions are also contradicted by long-standing policy positions of the U.S. government, see President Clinton's May 1996 Message to Congress (fully cited at Pet. 17), by the previous decision of the Iran Claims Tribunal in the B/66 Award (see Pet. 18), by the submission of the United States in a memorial filed in the B/61 Case (see Pet. 19), and by the position of the government in the proceedings below, see Brief for the U.S. as Amicus Curiae Supporting Rehearing, at 12-13 (9th Cir. filed June 19, 2007) ["U.S. Reh'g Br."]. It bears repeating, as Judge Fisher observed below in dissent, that because the Cubic judgment arises from the same transaction or contract that is the basis of Iran's claim against the United States for violation of the Algiers Accords, the U.S. is entitled to use the Cubic judgment as a set-off against any such award, and so the "effect of the Cubic judgment on the financial liability of the United States will be raised and adjudicated; that is sufficient to put the property 'in question'," and thus, "at issue." Pet. App. 32 & n.2.

2. Petitioner acknowledges that whether certain foreign-owned properties in the United States are "blocked assets," under TRIA, § 201(d)(2)(A); App. 118, is a complex inquiry.[1] But it is not a legally standardless one, as Respondent seems to suggest. Other circuits have given a narrowing construction to the TRIA's designation of "blocked assets," which is consistent with the weighty consequences that follow from such a finding. See *Bank of New York*, 484 F.3d at 150; *Hegna*, 376 F.3d at 493 n.32.

Contrary to Respondent's suggestion, Op. Cert. 25-28, Petitioner has been entirely consistent concerning the legal character of the Cubic judgment. Petitioner did previously argue that it qualified as a military asset under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1611(b)(2) ("property is, or is intended to be, used in connection with a military activity and . . . . is of a military character. . . ."). That is an entirely different inquiry from whether Petitioner had a

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[1] On October 25, 2007, the Ministry of Defense and Armed Forces Logistics (MODAFL) was listed by the Department of State, under Executive Order 13382, as having engaged in activities relating to the proliferation of weapons of mass destruction. See U.S. Treasury Press Release, http://www.treasury.gov/press/releases/hp614.htm. It is not evident whether this designation was intended to affect Petitioner, and it is not clear, pursuant to the regulations issued for this sanction program, if this development has any bearing on whether the Cubic judgment is a blocked asset. See 31 C.F.R. § 539.101 et seq. (2005); *Bank of New York v. Rubin*, 484 F.3d 149, 150-51 (2d Cir. 2007) (views of the U.S. sought).

possessory interest in the judgment, see *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003), such as to trigger a blocking order before January 19, 1981. As to that question, the Ninth Circuit had previously ruled that the Cubic judgment was not a "blocked asset," because Petitioner only acquired an interest in it after that date. See Pet. App. 55 & 76. Respondent offers no sensible explanation for the Ninth Circuit's change of heart on this point, save that the panel's earlier ruling was in relation to Stephen Flatow (another party seeking attachment of the Cubic judgment), and not Elahi.

3. Virtually elided from Respondent's discussion is that this matter has been before this Court previously, where it was the subject of an RVSG order, a strong filing was made by the United States, and a per curiam reversal followed. See 546 U.S. 450 (2006). On remand from this Court, the Ninth Circuit panel (Betty B. Fletcher, J., writing) persisted in making a ruling that was contrary to the position taken by the United States in a decision that the U.S. government, in an amicus brief filed in support of rehearing, characterized as "expos[ing] the United States to hundreds of millions of dollars of claims by Iran . . . . and concerns relations between the United States and Iran." U.S. Reh'g Br., at 1-2. For Respondent to suggest now that this matter does not implicate any significant foreign relations issues and does not undermine U.S. foreign policy, Op. Cert. 12-13, 28-31, is disingenuous at best. Respondent asserts, Op. Cert. 18 n.12, that just because the United States may be liable to Iran for the funds that Elahi proposes to

attach here, it is a "purely monetary concern," that fails to "raise 'sensitive issues concerning the foreign relations of the United States'," id. (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)). This is insensible to the realities of U.S. foreign policy, especially in the context of the complex political, military, diplomatic and financial relationship between the United States and the Islamic Republic of Iran.

This Court need not take Petitioner's word on the foreign policy significance of this case; it should request the views of the Solicitor General, as it did in the earlier incarnation of this matter. See 544 U.S. 998 (2005).

CONCLUSION

The petition ought to be granted.

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January 16, 2008

AMICUS CURIAE BRIEF

FILED
MAY 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-615

In the Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

DARIUSH ELAHI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held, contrary to the position of the Executive Branch, that the district court's 1998 judgment confirming a 1997 arbitral award in petitioner's favor is a "blocked asset" subject to attachment by respondent on the theory that the judgment represents military property in which petitioner's interest arose before January 19, 1981.

2. Whether respondent relinquished any right to attach petitioner's judgment when he accepted compensation under the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1541, thereby waiving his right to attach assets that are "at issue in claims against the United States before an international tribunal."

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In the Supreme Court of the United States

No. 07-615

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

DARIUSH ELAHI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant, vacate, and remand this case in light of developments subsequent to the decision below.

STATEMENT

1. In response to the seizure of American hostages at the United States Embassy in Tehran on November 4, 1979, the President exercised his powers under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701, 1702, and "blocked all property and interests in property of the Government of Iran * * * subject to the jurisdiction of the United States." Exec. Order (E.O.) No. 12,170, 3 C.F.R. 457 (1980); see 31 C.F.R. 535.201. The hos-

tage crisis was resolved with the January 19, 1981, signing of the Algiers Accords, 20 I.L.M. 224, in which the United States agreed in principle to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." *Ibid.* The Accords established the Iran-U.S. Claims Tribunal in the Hague for resolving, *inter alia*, claims of the United States and Iran against each other concerning their respective performance under the Accords. *Id.* at 230-232; see generally *Dames & Moore* v. *Regan*, 453 U.S. 654, 662-666 (1981).

On the day the Accords were concluded, the President directed the transfer to Iran of Iranian financial assets. E.O. 12,277-E.O. 12,280, 3 C.F.R. 105, 107, 109, 110 (1982); see 31 C.F.R. 535.211-535.214. The President also directed that most other Iranian property be transferred to Iran "as directed * * * by the Government of Iran." E.O. 12,281, 3 C.F.R. 112 (1982); see 31 C.F.R. 535.215. Finally, the President lifted the earlier prohibitions against transactions in Iranian property, E.O. 12,282, 3 C.F.R. 113 (1982), which the Treasury Department implemented by issuing a general license authorizing "[t]ransactions involving property in which Iran" has an interest where: "(1) The property comes within the jurisdiction of the United States * * * after January 19, 1981, or (2) The interest in the property of Iran * * * arises after January 19, 1981." 31 C.F.R. 535.579(a).

2. In 2000, Congress authorized the Secretary of the Treasury to make payments to certain individuals with judgments against Iran. Victims of Trafficking and Violence Protection Act of 2000 (VPA), Pub. L. No. 106-386, § 2002, 114 Stat. 1541. Under that statute, certain judgment creditors who sued Iran under 28 U.S.C. 1605(a)(7) for terrorism-related injuries were eligible to receive payment equal to at least their compensatory damages. VPA

§ 2002(a), 114 Stat. 1541.[1] Those who accept payment under VPA automatically relinquish certain rights, including their right to pursue compensatory damages and, depending on the amount of compensation they receive, their right "to execute against or attach property that is at issue in claims against the United States before an international tribunal, [or] that is the subject of awards rendered by such tribunal." § 2002(a)(2)(B)-(D), 114 Stat. 1542.

The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2337, amended VPA in several ways. First, Congress expanded the class of individuals eligible for payment to include all parties with final judgments against Iran who filed suit under Section 1605(a)(7) before October 28, 2000. § 201(c)(1), 116 Stat. 2337. Second, because the funds originally identified might not be sufficient to pay all remaining eligible persons amounts equal to their compensatory awards against Iran, Congress directed the Secretary of the Treasury to make pro rata payments to newly eligible persons. § 201(c)(4), 116 Stat. 2337. Finally, Congress limited the rights that must be relinquished by individuals who receive "less than the full amount of compensatory damage awards," while continuing to require that they relinquish their rights of "enforcement against property that is at issue in claims against the United States before an international tribunal

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[1] Section 1605(a)(7) provides an exception to the general rule of foreign state immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1604, for certain claims against designated state sponsors of terrorism. 28 U.S.C. 1605(a)(7). Congress recently repealed Section 1605(a)(7), and replaced it with a revised terrorism-related exception. See Act of Jan. 28, 2008, Pub. L. No. 110-181, § 1083(b)(1)(A)(iii), 122 Stat. 341; § 1083(a)(1), 122 Stat. 338 (enacting 28 U.S.C. 1605A).

or is the subject of an award by such a tribunal." § 201(c)(4), 116 Stat. 2339; see 68 Fed. Reg. 8080 (2003).

In addition to amending VPA, TRIA authorized creditors with judgments under Section 1605(a)(7) to attach "the blocked assets of [a] terrorist party." TRIA § 201(a), 116 Stat. 2337. "[B]locked asset[s]" include "any asset seized or frozen by the United States" under the Trading With the Enemy Act, 50 U.S.C. App. 5(b), or IEEPA. TRIA § 201(d)(2)(A), 116 Stat. 2339.

3. Respondent brought an action against the Islamic Republic of Iran and its Ministry of Information and Security (MIS) under Section 1605(a)(7), alleging that those entities were responsible for the wrongful death of respondent's brother, Cyrus Elahi. See *Elahi* v. *Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99 (D.D.C. 2000). Defendants failed to appear, and the district court found that agents of the MIS murdered Cyrus Elahi at the behest of Iran. *Id.* at 105-106. See 28 U.S.C. 1608(e) (requiring, in the event of default, that the claimant "establish[] his claim or right to relief"). The court awarded respondent $11,740,035 in compensatory damages and $300 million in punitive damages. *Elahi*, 124 F. Supp. 2d at 115.

Petitioner is the Ministry of Defense of the Islamic Republic of Iran. Before the 1979 Iranian revolution, petitioner's predecessor entered into two contracts with Cubic Defense Systems (Cubic), a California firm, for an Air Combat Maneuvering Range (ACMR), a type of military equipment. Pet. App. 6. Following the revolution, Cubic did not deliver the goods. *Ibid.* In 1991, pursuant to the contracts, petitioner sought arbitration by the International Chamber of Commerce (ICC) in Switzerland. *Id.* at 7. Petitioner prevailed before the ICC and, in 1997, obtained an award of $2.8 million. See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys.*,

Inc., 29 F. Supp. 2d 1168, 1171 (S.D. Cal. 1998), appeal pending, No. 99-56380 (9th Cir. filed Aug. 19, 1999) (*Cubic*). In 1998, petitioner obtained a judgment confirming that award in the United States District Court for the Southern District of California. *Ibid.*

After respondent obtained his judgment against Iran, he registered it in the same court in which petitioner had confirmed the arbitration award against Cubic. Respondent then filed a notice of lien against petitioner's judgment against Cubic. See Resp. Notice of Lien para. 2 & Exh. A, *Cubic*, *supra* (No. 98-CV-1165); Pet. App. 8. In response, petitioner sought a determination from the district court that the Cubic judgment was immune from attachment. *Ibid.* The district court held that the Cubic judgment was not immune because petitioner had, by invoking the court's jurisdiction to confirm the arbitration award, waived its immunity from attachment. *Ibid.*

Petitioner appealed, and the court of appeals affirmed. Pet. App. 38-80. The court of appeals rejected the district court's waiver analysis, *id.* at 59-63, but affirmed on the alternative ground, not briefed by the parties, that petitioner was an agency or instrumentality of Iran engaged in commercial activity in the United States, and therefore subject to an exception to attachment immunity under the FSIA, *id.* at 63-70. The court also rejected petitioner's argument that respondent's attachment of the Cubic judgment was not licensed under IEEPA. The court held that petitioner's "interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic," and that it was therefore subject to the general license for transactions involving property in which Iran's interest "arises after January 19, 1981." *Id.* at 76 (quoting 31 C.F.R. 535.579(a)(2)).

Petitioner filed a petition for a writ of certiorari, and the Court invited the United States' views. 544 U.S. 998 (2005). The United States' brief explained that the FSIA affords greater protection from attachment to the property of foreign states than to the property of their agencies or instrumentalities and that the court of appeals erred in holding that petitioner—a ministry of defense—is an agency or instrumentality of Iran, rather than an inseparable part of the Iranian state. U.S. Br. at 7-17, *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450 (2006) (No. 04-1095). The Court vacated the court of appeals' decision and remanded for further consideration of petitioner's status. 546 U.S. at 452-453.

4. On remand, a divided panel of the court of appeals again affirmed. On the issue this Court had directed the court of appeals to reconsider, the panel majority held that petitioner is "an inherent part of the state of Iran" entitled to the greater protections afforded to foreign states themselves under the FSIA. App, *infra*, 20a.[2] Respondent contended, however, that he could now attach the Cubic judgment on the alternative ground that it is the blocked asset of a terrorist party and therefore subject to attachment under TRIA § 201(a). *Id.* at 11a. Petitioner argued that the Cubic judgment was not a "blocked asset" and that, in any event, respondent waived his right to attach the Cubic judgment when he accepted a $2.3 million payment under TRIA "in partial satisfaction of his $11.7 million compensatory damages award against Iran." *Id.* at 6a, 15a. Petitioner and the United States, as amicus curiae, explained that the Cubic judgment is "at issue" in Claim B/61 brought by Iran against the United States in the Iran-U.S. Claims Tribunal

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[2] The court of appeals' original opinion on remand, before being amended on rehearing, is reproduced in an appendix to this brief.

and therefore subject to TRIA's relinquishment requirement. *Id.* at 7a. The court of appeals held for respondent on both points. *Id.* at 10a, 15a.

The panel majority first held that respondent had not relinquished his right to attach the Cubic judgment. It recognized that Iran seeks damages from the United States in the B/61 case before the Claims Tribunal "based on the non-export of contracted-for goods, including the ACMR that was the subject of the Cubic contract," App., *infra*, 8a, and that Iran had represented that it would "offset from its demand against the United States * * * any proceeds it receives from the Cubic judgment," *id.* at 9a. The majority nonetheless held that the Cubic judgment was not "at issue" in Claim B/61 because "the Cubic judgment * * * resolved Cubic's liability to Iran for non-delivery of the ACMR," whereas "Claim B/61 addresses what liability the United States incurred by failing to restore frozen Iranian assets, including the ACMR, as required under the Algiers Accords." *Ibid.*

The panel majority further held that respondent could attach the Cubic judgment under TRIA § 201(a) because it is a "blocked asset." The majority determined that the Cubic judgment is a "blocked asset" because "no action by the executive branch has ever unblocked the assets in which Iran has an interest that antedates the Revolution, as its interest in the Cubic judgment does in this case." App., *infra*, 15a.

Judge Fisher dissented. He would have held that, by accepting compensation under TRIA, respondent relinquished his right to attach the Cubic judgment because it is "at issue" in Claim B/61. Judge Fisher noted Iran's recognition that any amount it collected under the Cubic judgment would offset its claims against the United States, and that, even without that concession, the United States would

be entitled to a setoff because Claim B/61 "arises from the same transaction or contract as the underlying claim." App., *infra*, 26a. That conclusion was further supported by Congress's "evident" intent in enacting the relinquishment provision "to prevent victims of terrorism who accept money from the federal treasury from attaching * * * property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals." *Id.* at 26a-27a.

5. Petitioner sought rehearing. The United States filed an amicus brief explaining that rehearing was critical because the majority's holding that the Executive Branch failed to unblock any property in which Iran had an interest antedating the Iranian revolution was inconsistent with numerous Executive Orders and regulations authorizing the transfer of such property, was contrary to the position taken by the United States before the Iran-U.S. Claims Tribunal, and could seriously impair the United States' interests before that tribunal. U.S. Amicus Br. Supporting Reh'g 5-6, 9-11. The United States further observed that the majority's opinion reversed the panel's original opinion in this case, which held that petitioner's interest in the Cubic judgment arose in 1998 and was transferable pursuant to the general license, *id.* at 8; Pet. App. 76, a position that the United States had endorsed at oral argument, Recording of Argument, No. 03-55015, at 45 min. 23 sec. (Jan. 26, 2007).

In response, the panel majority issued an amended opinion. The principal change was to delete the erroneous statement that the Executive Branch had never unblocked any property in which Iran's interest antedated "the Revolution." Pet. App. 3; App., *infra*, 15a. In its place, the majority inserted a paragraph in which it recognized that "[f]ollowing release of the hostages, the United States un-

blocked most Iranian assets," but went on to state that "military goods such as the ACMR remained blocked." Pet. App. 3. Although no party had urged the distinction upon which the majority rested its amended decision, and neither petitioner nor the United States had had an opportunity to respond to it, the court proceeded to deny the petition for rehearing and ordered that "[n]o further petitions for rehearing or for rehearing en banc may be filed." *Id.* at 4.

6. Further developments since the court of appeals' decision significantly affect the proper analysis of the question presented in the petition. On October 25, 2007, the Department of State designated the Iranian Ministry of Defense and Armed Forces Logistics as an entity of proliferation concern. 72 Fed. Reg. 71,991-71,992. Despite minor discrepancies in translation, petitioner is the same entity as the one designated. See *id.* at 71,992 (listing designated entity as: "MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS (a.k.a. MODAFL; a.k.a. MINISTRY OF DEFENSE AND SUPPORT FOR ARMED FORCES LOGISTICS; a.k.a. MODSAF)"). Because the State Department designated petitioner under the authority of an Executive Order that was issued pursuant to IEEPA, the "property and interests in property" of petitioner are now "blocked." *Ibid.*

DISCUSSION

Although not presented as separate questions, petitioner actually seeks this Court's review of two distinct issues: (1) whether the Cubic judgment is a blocked asset subject to attachment under TRIA; and (2) whether the Cubic judgment is at issue before the Iran-U.S. Claims Tribunal, such that respondent relinquished his right to attach the judgment under TRIA when, pursuant to the same statute, he accepted payment from the United States Treasury.

The Ninth Circuit's ruling on the first issue is clearly wrong and is contrary to the longstanding position of the United States. That ruling, moreover, was rendered by that court sua sponte on rehearing, without that issue having been addressed by the parties or by the United States in its amicus brief. Despite the sua sponte injection of that issue into the case, the court of appeals barred the filing of any further rehearing petition that could have sought to correct it. The State Department, however, has since designated petitioner as an entity of proliferation concern. Because the Ninth Circuit did not have an opportunity to consider the effect of that recent designation on the status of petitioner's interest in the Cubic judgment—and because of the nature of the proceedings and ruling below—it would be appropriate for the Court to grant the petition, vacate the judgment of the court of appeals, and remand for reconsideration in light of the State Department's recent designation of petitioner.

The second issue does not independently warrant this Court's review. Although the Ninth Circuit's decision on that issue was erroneous as well, even if the court of appeals had correctly held that respondent relinquished his right to execute against the Cubic judgment, other judgment creditors of Iran who have not relinquished their rights of attachment and who have registered liens would execute against the judgment instead. Because petitioner has not established that resolution of that issue is of practical consequence to it, there is no reason for this Court to review the court of appeals' holding on that issue in this case.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CUBIC JUDGMENT WAS BLOCKED, AND THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF THE EFFECT OF THE STATE DEPARTMENT'S RECENT DESIGNATION OF PETITIONER

A. The Court Of Appeals' Holding That The Cubic Judgment Was Blocked At The Time Of Its Judgment Was Erroneous

1. As the court of appeals correctly held in its initial opinion, Pet. App. 76, the asset here at issue is petitioner's interest in the judgment it obtained against Cubic. The Treasury Department regulation implementing the relevant Executive Orders recognizes "judgments" as a type of property that is distinct from "goods, wares, merchandise, [and] chattels." 31 C.F.R. 535.311. In its initial decision in this case, the court of appeals correctly held that petitioner's "interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." Pet. App. 76. The court's initial ruling was also correct that "any transactions involving the Cubic judgment are authorized," *ibid.*, under the general license set forth at 31 C.F.R. 535.579(a)(2), which permits transactions in "property" in which Iran's interest "arises after January 19, 1981," *ibid.* Because transactions in the Cubic judgment were expressly authorized by the general license at the time of the court of appeals' decision, the judgment was *not* subject to attachment under TRIA at that time. See TRIA § 201(a) and (d)(2)(A), 116 Stat. 2337, 2339; *Bank of N.Y.* v. *Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (Properties "subject to the general license of 31 C.F.R. § 535.579[] are not blocked assets under the TRIA and therefore are not subject to attachment under that statute.").

On remand from this Court, the court of appeals reversed itself without even mentioning its earlier holding, Pet. App. 19-20; *cf. id.* at 76, and despite the fact that the United States had, at oral argument, endorsed the court's original conclusion that the Cubic judgment was subject to the general license, see p. 8, *supra*. The court concluded instead that the question whether petitioner's interest in the Cubic judgment was blocked depended upon the nature and status of the underlying assets that were the source of the dispute giving rise to the judgment. Pet. App. 19-20. That conclusion was in error. Respondent is not trying to attach military equipment; he seeks to attach petitioner's money judgment against Cubic, which confirmed an arbitration award for breach of contract. As noted, the regulations treat "judgments" and "merchandise" as distinct types of property. See 31 C.F.R. 535.311. And even if the regulation were ambiguous, the government's construction of it would be entitled to substantial deference. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

Even if the court of appeals were correct in focusing on Iran's interests underlying the Cubic judgment, rather than on the judgment itself, it *still* erred in concluding that the relevant interests pre-date January 1981. Petitioner's claim in the arbitration proceeding was for breach of contract. As the international arbitration award explains, Cubic incorporated parts of the ACMR equipment in a subsequent sale of similar equipment to Canada, which occurred in September 1981. ICC Award ¶¶ 15.6, 15.15(a).[3] Whether petitioner was "entitled to be (partly) reimbursed for the payments it had made to Cubic" depended entirely on that resale of the equipment in September 1981. *Id.* ¶ 11.28.

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[3] The arbitration award is Exhibit 3 to petitioner's petition to confirm the award, filed in the district court below.

After discounting for various costs and allowing for certain profits, the arbitration panel determined that, after the sale, Cubic owed petitioner $2.8 million. *Id.* ¶¶ 18.1, 19.7. The Cubic judgment thus "represents" petitioner's interest not in the military equipment itself, but in its share of the proceeds of the resale of that equipment in September 1981. Because petitioner's interest in the proceeds arose after January 19, 1981, it is subject to the general license, and was not subject to attachment under TRIA, even if the proper focus of the blocked-status inquiry is the property interest that the Cubic judgment "represents."

2. Even if the court were correct in focusing on petitioner's pre-1981 interest in the ACMR or the 1977 contract concerning that equipment, the court failed to consider whether that property interest was subject to other Executive Orders and implementing regulations that unblocked it under IEEPA. As the United States explained to the court of appeals in its amicus curiae brief in support of rehearing (at 10), the President issued several Executive Orders and the Treasury Department issued numerous implementing regulations to ensure the free mobility of Iran's property in accordance with the Algiers Accords. See E.O. 12,277-12,281. In particular, any pre-January 19, 1981, property interest of petitioner represented by the $2.8 million Cubic judgment was subject to the Executive Order and regulation requiring transfer to Iran of property owned by Iran on January 19, 1981, the date the Accords were signed, and was, for that reason, not blocked under IEEPA. E.O. 12,281; 31 C.F.R. 535.215. It therefore was not "blocked for purposes of attachment under TRIA.

In response to the petition for rehearing and the government's amicus brief in support of it, the majority deleted its broad statement that "no action by the executive branch has ever unblocked the assets in which Iran has an interest

that antedates the Revolution," App, *infra*, 15a, and replaced it with a narrower, but no less erroneous, categorical statement that the Executive Branch has never unblocked "military goods such as the ACMR," Pet. App. 3, 19. In support of that conclusion, which no party had ever advanced and the United States had no occasion to refute, the court of appeals cited, without explanation, the Arms Export Control Act, 22 U.S.C. 2751 *et seq.*; its implementing regulations, 22 C.F.R. Pts. 120-130; the President's 1979 Executive Order blocking Iran's interest in property, E.O. 12,170; a 2005 Presidential notice extending the national emergency with respect to Iran, 70 Fed. Reg. 69,039; and a Treasury Department brochure for exporters concerning foreign assets control regulations, Office of Foreign Assets Control, Dep't of the Treasury, *Foreign Assets Control Regulations for Exporters and Importers* 23 (June 15, 2007) (*2007 Export Advisory*). See Pet. App. 3, 19. None of the cited authorities supports the court of appeals' categorical conclusion that the United States failed to unblock Iran's interest in military property after the Algiers Accords.

The court of appeals' citation to the Arms Export Control Act suggests that its holding is premised on a confusion of two very different issues: (1) whether certain property is "blocked"; and (2) whether the property is subject to other regulations that may limit its use or the entities to whom it can be transferred. Although the various Executive Orders issued after the Algiers Accords lifted restrictions the President had imposed on Iran's Property pursuant to his IEEPA authority, certain property, such as military equipment, remained regulated under other statutes, such as the Arms Export Control Act, as it was on November 14, 1979. See 31 C.F.R. 535.215(c). But even though those regulations may have prevented the export of mili-

tary property to Iran, the property was not seized or frozen, and Iran was free to dispose of the property in other ways permitted by the regulations and thereby recoup its losses. Thus, the fact that property is regulated under the Arms Export Control Act does not mean that it is blocked.

The court of appeals' reliance (Pet. App. 3, 19) on the *1979* Executive Order is similarly misplaced because it ignores the effect of the Executive Orders issued after the Algiers Accords, which lifted prior restrictions imposed on property in which Iran had an interest. The 2005 Presidential notice that the court of appeals cites (*ibid.*) is also inapposite. It does not impose any new restrictions, but simply extended for one year the national emergency with respect to Iran. 70 Fed. Reg. at 69,039.

Finally, the court of appeals' reliance (Pet. App. 3, 19) on the *2007 Export Advisory* is also misplaced. That advisory stated that "[c]ertain assets" consisting "mainly of military and dual-use property" and relating to claims before the Iran-U.S. Claims Tribunal "remain blocked in the United States." *2007 Export Advisory* 23. That statement, which referred to certain specific assets as to which Iran had only a partial or contingent interest, has no bearing whatsoever on this case.[4] There is no dispute that the physical military equipment that was the subject of the contract between petitioner and Cubic was long ago incorporated by Cubic into another system and sold to Canada. See ICC Award ¶¶ 15.6, 15.15(a). The court of appeals' interpretation of the *2007 Export Advisory*, adopted without any briefing by the parties or by the Treasury Department, which issued it, was mistaken.

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[4] Indeed, the language on which the court of appeals relied does not appear in more recent versions of the export advisory. See, *e.g.*, Office of Foreign Assets Control, Dep't of Treasury, *Foreign Assets Control Regulations for Exporters and Importers* 23 (Oct. 25, 2007).

B. The Court Should Vacate And Remand For Consideration Of The Cubic Judgment's Status In Light Of The State Department's Recent Designation Of Petitioner

Although the court of appeals erred in holding that the Cubic judgment was at the time of its decision a "blocked asset," subsequent developments establish that the Cubic judgment is now "blocked" on different grounds. As noted, the State Department recently designated petitioner as an entity that has materially contributed to "the proliferation of weapons of mass destruction," whose assets "are blocked." 72 Fed. Reg. at 71,991-71,992. As a consequence, "any assets" in which petitioner has an interest that are "under U.S. jurisdiction [are] frozen." *Ibid.* In addition, because the State Department designated petitioner under Executive Order 13382, see *ibid.*, which the President issued pursuant to IEEPA, property that is frozen as a consequence of the new designation qualifies as a "blocked asset" within the meaning of TRIA. § 201(d)(2)(A), 116 Stat. 2339. In the United States' view, the Cubic judgment is therefore now properly subject to attachment under TRIA. § 201(a) and (d), 116 Stat. 2337, 2339.

Because the State Department's designation of petitioner post-dates the court of appeals' judgment, the parties did not have an opportunity to brief that issue, and the court of appeals had no opportunity to consider whether to rest its holding on that ground, rather than the erroneous ground on which it relied. We therefore recommend that the Court grant the petition, vacate the court of appeals' judgment, and remand for further consideration in light of the State Department's recent designation of petitioner. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

There are substantial reasons for the Court to dispose of the case in that manner. In the Iran-U.S. Claims Tribu-

nal, Iran has asserted numerous claims against the United States, alleging that the United States' failure to arrange for the transfer of all Iranian property or alternatively to compensate Iran for losses violates the Accords. In Claim B/61, Iran seeks compensation in excess of $2 billion for losses incurred when the United States refused permission, under the Arms Export Control Act and other authorities, to export military property, including the ACMR. See *President's Message to the Congress Reporting on the National Emergency with Respect to Iran*, Pub. Papers 756 (1996). It obviously is the position of the United States that Iran's claims are without merit, for the reasons explained above. Thus, in responding to that contention, the United States has relied on the various Executive Orders and regulations implementing the United States' obligations under the Accords to argue that Iran was free to dispose of the property consistent with the regulations, and thereby avoid its alleged losses.

Indeed, petitioner agrees that the court of appeals' decision is incorrect and that, consistent with the United States' undertakings in the Algiers Accords, the President *did* lift the blocking orders with respect to the assets at issue here. See Pet. 27; see generally Pet. 25-30. Nonetheless, petitioner appears to raise the prospect that it could use the court of appeals' admittedly erroneous statement before the Claims Tribunal, asserting that if the decision below is correct, the United States is in "manifest violation of the Algiers Accords, and subject to remedial proceedings at the Iran-U.S. Claims Tribunal." Pet. 27.

In view of these assertions by petitioner, it would be appropriate for this Court to grant the petition, vacate the court of appeals' judgment, and remand to that court for further proceedings. The court of appeals would thereby be afforded an opportunity to reconsider and eliminate its er-

roneous ruling regarding the status of military property—which it otherwise insulated from review by foreclosing the parties from filing a rehearing petition addressing that sua sponte disposition—and instead to find that Iran's interest in the Cubic judgment is now blocked on the basis of the State Department's recent designation. Resting the decision on that ground would not implicate proceedings before the Claims Tribunal. Moreover, that course would not prejudice respondent, because a holding by the court of appeals that the Cubic judgment is blocked and subject to attachment under TRIA as a result of the recent designation would have the same practical consequence for respondent as the court of appeals' present ruling. By the same token, a holding that rested on the recent designation would obviate the basis for petitioner's assertion of a conflict between the decision below and those of other courts of appeals.[5]

Accordingly, it would be appropriate for the Court to grant the petition for a writ of certiorari on the question whether the Cubic judgment is a blocked asset, vacate the judgment of the court of appeals, and remand the case for

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[5] Contrary to petitioner's assertion, however, we do not perceive a conflict among the courts of appeals. See Pet. 24. For example, the court of appeals did not disagree with the Second Circuit that assets subject "to the general license of 31 C.F.R. 535.579, are not blocked assets under the TRIA." Pet. 29 (quoting *Rubin*, 484 F.3d at 150). To the contrary, the panel majority expressly recognized that property in which Iran's interest arose after January 19, 1981, are unblocked. Pet. App. 4, but held that the general license was inapplicable here because petitioner's interest in the property at issue here arose *prior* to that date. *Ibid.* While that determination is erroneous, it does not conflict with the Second Circuit's decision in *Rubin*. Nor, contrary to petitioner's assertion (Pet. 29), does the court of appeals' decision conflict with the Fifth Circuit's decision in *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 485, 493 n.32 (2004), which simply quotes without comment from TRIA's definition of "blocked assets."

further consideration in light of the State Department's recent designation of petitioner.

II. REVIEW IS NOT WARRANTED ON THE QUESTION WHETHER RESPONDENT RELINQUISHED HIS RIGHT TO ATTACH THE CUBIC JUDGMENT

The United States agrees with petitioner (Pet. 16-23) that the panel majority erred in holding that the Cubic judgment is not "at issue" before the Iran-U.S. Claims Tribunal in Claim B/61. As Judge Fisher correctly observed, TRIA's unambiguous text and the evident Congressional intent demonstrate that the relinquishment provision was meant "to prevent victims of terrorism who accept money from the federal treasury from attaching * * * property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals." Pet. App. 33. No matter what the full scope of the "at issue" provision might be, it is self-evident that the Cubic judgment is "at issue" before the Claims Tribunal. The same facts that were the basis of petitioner's claim against Cubic also give rise to Iran's claim against the United States, such that the United States would be entitled to a set-off in the amount of the Cubic judgment against any award in favor of Iran, and Iran has so acknowledged. See *id.* at 32 (Fisher, J., dissenting). Indeed, even the panel majority recognized that Iran's claim against the United States before the Claims Tribunal, as it "[r]elate[s] to the ACMR," is that "the $2.8 million ICC award (which became the Cubic judgment) did not fully compensate [Iran] for Cubic's non-delivery of goods, and it seeks to recoup the difference from the United States." *Id.* at 12. Thus, even in the majority's view, there is a direct (and inverse) relationship between the amount of petitioner's recovery from Cubic and the amount of Iran's claims against the United States. By per-

mitting respondent to both collect payment from the United States pursuant to TRIA and attach assets that would otherwise reduce the amount of Iran's claim against the United States, the court of appeals' decision forces the United States, in effect, to pay respondent an additional amount beyond what the relinquishment provision was intended to provide. See *id.* at 33 (Fisher, J., dissenting).

Despite the court of appeals' error, the relinquishment issue does not warrant this Court's review. Even if respondent were determined to have relinquished his claims, other judgment creditors of Iran have liens against the Cubic judgment. See Rafii and Rubin Notices of Lien, *Cubic*, *supra* (No. 98-CV-1165). Those other victims have not received compensation under VPA or TRIA and so have not relinquished any right to attach the Cubic judgment. Thus, even if respondent's own attachment efforts were frustrated, it is unlikely that petitioner would benefit in any practical way. Nor, for the same reason, would resolution of the relinquishment issue ultimately affect the United States' ability to rely on the Cubic judgment to offset any liability it may be found to have in Claim B/61.[6]

Moreover, contrary to petitioner's assertions, Pet. 22, the court of appeals' ruling on the relinquishment issue does not conflict with the decisions of other courts of appeals. In each of the four cases petitioner identifies, the property that the judgment creditor sought to attach was the precise subject of a claim by Iran against the United

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[6] That does not mean the relinquishment issue is of no moment. The panel majority's error deprives judgment creditors who did not receive compensation and who have not relinquished their right to attach the Cubic judgment. However, that consequence, which the other claimants have not themselves appeared to contest, does not in itself justify the Court's plenary review.

States in the Iran-U.S. Claims Tribunal.[7] Thus, although the majority erred in its conclusion on this point, its resolution of that issue does not warrant review by this Court.

CONCLUSION

The Court should grant the petition for a writ of certiorari in part, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration of the blocked status of the Cubic judgment in light of the State Department's October 25, 2007, designation of petitioner as an entity of proliferation concern. 72 Fed. Reg. at 71,991-71,992.

Respectfully submitted.

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MAY 2008

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[7] See *Hegna* v. *Islamic Republic of Iran*, 380 F.3d 1000, 1009 (7th Cir. 2004); *Hegna*, 376 F.3d at 493; *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004); *Hegna* v. *Islamic Republic of Iran*, 299 F. Supp. 2d 229, 230 (S.D.N.Y. 2004), aff'd, 402 F.3d 97, 99 (2d Cir. 2005).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55015
D.C. No. CV-98-01165-RMB

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, AS SUCCESSOR IN INTEREST TO THE MINISTRY OF WAR OF THE GOVERNMENT OF IRAN, PLAINTIFF-APPELLANT

v.

CUBIC DEFENSE SYSTEMS, INC., AS SUCCESSOR IN INTEREST TO CUBIC INTERNATIONAL SALES CORPORATION, DEFENDANT

v.

DARIUSH ELAHI, INTERVENOR-APPELLEE

Argued and Submitted:
Jan. 26, 2007—Pasadena, California
Filed: May 30, 2007

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

OPINION

Before: BETTY B. FLETCHER, KIM MCLANE WARDLAW, and RAYMOND C. FISHER, Circuit Judges.

Opinion by JUDGE B. FLETCHER;

Dissent by JUDGE FISHER

B. FLETCHER, Circuit Judge:

This case arises from Dariush Elahi's attempt to collect on a default judgment he holds against Iran. Elahi seeks to attach a $2.8 million judgment obtained in a contract dispute by the Iranian Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran. The district court allowed Elahi to attach the judgment, holding that the Ministry had waived its immunity from attachment by submitting to the jurisdiction of the court. We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we affirm the district court on the alternative ground that the judgment is subject to attachment under section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2,322, 2,337 (codified at 28 U.S.C. § 1610 note).

BACKGROUND

The Wrongful Death Default Judgment

Dr. Cyrus Elahi was shot and killed as he left his apartment building in Paris, France, on October 23, 1990. *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 103 (D.D.C. 2000). His brother, Dariush Elahi, brought a wrongful death action against the state of

Iran and the Iranian Ministry of Information and Security ("MOIS") in the United States District Court for the District of Columbia, claiming Iranian agents assassinated his brother. *Id.* at 97, 100. Although Iran and MOIS did not appear, the court heard testimony and read documentary evidence relating to the assassination;[1] this evidence satisfied the court that Iran and MOIS were liable for Dr. Elahi's death. *Id.* at 100-05, 114. It entered a default judgment against Iran and MOIS for $11.7 million in compensatory damages and punitive damages of $300 million. *Id.* at 115. It is this judgment that Elahi now seeks to satisfy by attaching the Cubic judgment.

The Contract Dispute between Cubic Defense Systems and the Iranian Ministry of Defense

In October 1977, the predecessor of the Iranian Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran ("MOD" or "the Ministry") entered into two contracts with an American defense contractor, now known as Cubic Defense Systems ("Cubic"), for the sale and service of an Air Combat Maneuvering Range ("ACMR") for use by the Iranian Air Force. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168, 1170 (S.D. Cal. 1998). Iran made partial payment on the ACMR, but never received it; following the Iranian Revolution of 1979, Cubic breached its contract with the Ministry and sold the ACMR elsewhere. *Id.* In an attempt to recover the

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[1] Before a court may enter a default judgment against a foreign state, the Foreign Sovereign Immunities Act requires that the plaintiff "establish [ ] his claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. § 1608(e).

ACMR or its payments, Iran filed a claim against Cubic with the Iran-U.S. Claims Tribunal in The Hague, which was dismissed for lack of jurisdiction.[2] *Id.* Subsequently, Iran requested arbitration before the International Chamber of Commerce ("ICC") in Zurich. *Id.* Having conducted a hearing at which both parties were represented, the ICC issued an award for MOD, ordering Cubic to pay $2.8 million in damages for breach of contract. *Id.* at 1171. The Ministry reduced this ICC award to a judgment ("the Cubic judgment") in the United States District Court for the Southern District of California. *Id.* at 1170-74.

Elahi's attempt to attach the Cubic judgment

On November 1, 2001, Elahi sought a lien against the Cubic judgment to satisfy partially his judgment against Iran. MOD filed a motion seeking a judicial determination that the Cubic judgment is immune from attachment by Elahi.[3] Denying the motion, the district court

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[2] The Tribunal is a tribunal of limited jurisdiction. It has jurisdiction only over claims brought against the United States or Iran, not against private parties. It may hear the following claims: (1) those brought by nationals of one state against the government of the other, and related counterclaims; (2) intergovernmental claims arising out of contracts for the purchase and sale of goods and services; and (3) intergovernmental claims regarding the interpretation of the Algiers Declarations. *See* Claims Settlement Declaration, Article II, *available at* http://www.iusct.org/claims-settlement.pdf.

The Iran-U.S. Claims Tribunal was created by mutual agreement of Iran and the United States in response to the Iranian hostage crisis and the freezing of Iranian assets by the United States. For more information about the Claims Tribunal and the Algiers Accords, *see* www.iusct.org/background-english.html.

[3] The Ministry filed a second motion seeking a determination that its judgment was immune from attachment by Stephen Flatow, another

ruled that in waiving its immunity from jurisdiction by submitting to ICC arbitration and seeking confirmation of the arbitration award in district court, MOD had also waived its immunity from attachment of its property. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 236 F. Supp. 2d 1140, 1151-52 (S.D. Cal. 2002).

The Ministry appealed, and we affirmed the district court's holding that Elahi could attach the Cubic judgment, although we relied on different grounds. 385 F.3d 1206 (9th Cir. 2004) *vacated and remanded, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2006) (per curiam). Relying on the structure and traditional interpretation of the Foreign Sovereign Immunities Act ("FSIA"), we held that the two immunities are separate and that MOD's waiver of jurisdictional immunity did not waive its attachment immunity. *Id.* at 1219. Nonetheless, we affirmed the district court's determination that Elahi could attach the Cubic judgment on the ground that MOD, as an agency of Iran engaged in commercial activity in the United States, fell within a FSIA exception to immunity allowing attachment of certain property connected to commercial activity. *See id.* at 1219; *see also* 28 U.S.C. § 1610(b).

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judgment creditor. The district court granted the Ministry's motion as to Flatow, and we affirmed. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206, 1217 (9th Cir. 2004) *reversed on other grounds as to Elahi by Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2006). Because Flatow did not appeal our decision to the Supreme Court, that judgment is not now before us.

The Ministry appealed to the United States Supreme Court, which granted certiorari on the limited question of whether MOD constituted a foreign state or an agency or instrumentality of a foreign state. *See Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 126 S. Ct. 1193, 1194 (2006) (per curiam). Noting that FSIA offers broader immunity from attachment to a foreign state than to a foreign state's agencies and instrumentalities, the Court addressed the question of whether we had properly determined that the Ministry was an agency or instrumentality of Iran rather than the foreign state itself. *Id.* Finding that we had not, the Court remanded for reconsideration. *Id.* at 1195.

On remand, we requested two rounds of supplemental briefing and permitted the United States to appear as *amicus curiae*. As a result of this supplemental briefing, two additional issues have emerged. First, the parties agree that in 2003, Elahi applied for and received payment of $2.3 million from the United States Treasury in partial satisfaction of his $11.7 million compensatory damages award against Iran. In receiving this payment, Elahi signed a declaration in which he relinquished some, but not all, of his rights to pursue the remainder of his default judgment against Iran. Specifically, he relinquished his right to punitive damages and his right to "execute against or attach property that is at issue in claims against the United States before an international tribunal." Office of Foreign Assets Control, Department of Treasury, *Payment to Persons Who Hold Certain Judgments Against Cuba or Iran*, 68 Fed. Reg. 8,077, 8,081 (Feb. 19, 2003); *see also* Victims of Trafficking and Violence Protection Act of 2000 ("Victims Protection

Act"), Pub. L. No. 106-386, § 2002(a)(2)(D) (as amended by TRIA, § 201(c)(4)).

The Ministry and the United States both argue that by accepting this payment Elahi waived his right to attach the Cubic judgment. They contend that the Cubic judgment is currently "at issue" in Claim B/61 before the Iran-U.S. Claims Tribunal in The Hague in which Iran is attempting to recover, from the United States, *inter alia*, any value of the Cubic contracts in excess of the ICC award.

The second new issue is Elahi's contention that he may attach the Cubic judgment under TRIA § 201, which created an alternative avenue of attachment for certain judgment creditors of "terrorist part[ies]."

Discussion

1. Elahi's purported waiver pursuant to his receipt of payment under the Victims Protection Act

In the fall of 2000, Congress directed the Secretary of the Treasury to make available to certain judgment creditors of Iran payments equal to the creditors' compensatory damages awards. Victims Protection Act, § 2002(a)(1). Under this statute, a person is eligible to receive payment for certain judgments against Iran for harms caused by state-sponsored terrorism. *Id.* § 2002(a)(2)(A)(i). Creditors who had filed suit on certain dates were eligible to receive payment, as were those who had received a final judgment by July 20, 2000. *Id.* §§ 2002(a)(2)(A)(i), (ii). Under the terms of the Victims Protection Act, Elahi was not eligible to receive payment.

In 2002, Congress amended the Victims Protection Act in several ways, three of which we highlight here.

See TRIA § 201. First, it expanded the class of judgment creditors eligible to receive payment under the Victims Protection Act to include certain creditors who had filed suit against Iran before October 28, 2000 based on claims of state-sponsored terrorism. Victims Protection Act, § 2002(a)(2)(A)(ii) (as amended by TRIA § 201(c)(1)). This amendment made Elahi eligible to receive payment under the Victims Protection Act, as he had filed suit before October 28, 2000. *See Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d at 99-100 (noting entry of default judgment on August 14, 2000). Second, based on Congress's recognition of the limited funds available to pay victims with judgments against Iran, the amended Victims Protection Act authorized the Secretary of the Treasury to make pro rata payments on compensatory damages awards. Victims Protection Act, § 2002(d)(1) (as amended by TRIA § 201(c)(4)). Finally, the statute requires a person who accepts a pro rata payment to relinquish certain rights, including the right to execute against or attach "property that is at issue in claims against the United States before an international tribunal" or that is the subject of awards by such tribunal. *Id.* § 2002(a)(2)(D) (as amended by TRIA § 201(c)(4)). Elahi concedes that he waived this right by accepting a pro rata payment under the Victims Protection Act.

Iran has brought a claim against the United States in the Iran-U.S. Claims Tribunal, Claim B/61, for damages based on the non-export of contracted-for goods, including the ACMR that was the subject of the Cubic contract, by United States companies who breached contracts following the Iranian Revolution. Related to the ACMR, Iran contends in its brief to the Claims Tribunal that the $2.8 million ICC award (which became the Cu-

bic judgment) did not fully compensate it for Cubic's non-delivery of goods, and it seeks to recoup the difference from the United States. In that filing, Iran distinguished between the Cubic judgment and its claim before the Claims Tribunal, stating, "[t]he subject-matter of this case, at variance with the ICC action, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties." In other words, the Cubic judgment itself already adjudicated in the ICC action is not "at issue" in Iran's claim that it has not been fully compensated by the United States.

We find this concession persuasive in distinguishing between the contractual obligations resolved through the Cubic judgment and the United States' obligations that will be addressed before the Claims Tribunal. In essence, Claim B/61 addresses what liability the United States incurred by failing to restore frozen Iranian assets, including the ACMR, as required under the Algiers Accords.[4] In contrast, the Cubic judgment had resolved Cubic's liability to Iran for nondelivery of the ACMR.

Nonetheless, Iran argues that the Cubic judgment is "at issue" before the Claims Tribunal because Iran has offered to offset from its demand against the United States in Tribunal Case B/61 any proceeds it receives from the Cubic judgment. This argument ignores Iran's presentation of its claims against Cubic to the ICC and its resulting judgment against Cubic. Having arbitrated

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[4] The main commitments of the Algiers Accords were (1) the release by Iran of 52 American hostages; and (2) the agreement by the United States to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." *See* General Declaration, General Principles, A at 1, *available at* http://www.iusct.org/generaldeclaration.pdf

this dispute before the ICC and secured a judgment against Cubic for its breach, Iran has fully adjudicated its claim against Cubic for non-delivery of the ACMR. Further, as noted *supra*, the Tribunal has no jurisdiction over claims against private parties.[5] The question of whether Elahi can attach the Cubic judgment is a separate matter from Iran's claim against the United States. Iran's claim against Cubic has been addressed by a tribunal, resolved by the $2.8 million arbitration award against Cubic, and further reduced to a judgment in the Southern District of California.[6]

We hold that the Cubic judgment is not "at issue" before the Claims Tribunal and therefore that Elahi did not waive his right to attach the Cubic judgment by accepting a pro rata payment under the Victims Protection Act.[7]

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[5] *See supra* note 2.

[6] We note that four sister circuits have recently barred claims brought by a family who has accepted payment under the Victims Protection Act, as amended by TRIA, on the grounds that the properties they were attempting to attach were "at issue" before the Claims Tribunal. *See Hegna v.Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 (4th Cir. 2004). Each of those cases presented a factual situation, different from the one with which we are confronted, involving properties that had not yet been subject to any judicial determination of liability. Here, the Cubic judgment has been adjudicated and, as Iran concedes in its filing to the Claims Tribunal, is no longer at issue before the Tribunal.

[7] The majority and the dissent interpret differently the breadth of the term "at issue." The majority is guided by the plain meaning of "at issue," which is "under dispute" or "in question." Black's Law Dictionary (8th ed. 2004).

2. Attachment under TRIA § 201(a)

On remand, Elahi advances the alternative claim that he may attach the Cubic judgment under TRIA § 201(a).[8] We agree that Congress created, in passing TRIA, a method of attachment for creditors such as Elahi who hold final judgments for harms caused by terrorism. *See* TRIA § 201(a) (incorporating by reference 28 U.S.C. § 1605(a)(7)).

Under TRIA, these creditors may attach "the blocked assets of [a] terrorist party." *Id.* Specifically, TRIA § 201(a) provides:

> (a) In general.—Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party on

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TRIA does not suggest a different conclusion. The dissent reads Congress's choice of the phrase "at issue" as cutting a broader swath than the phrase "the subject of" resolved claims. However, that distinction is untenable. It would embrace both properties as to which any dispute already has been resolved and those currently contested. "At issue" clearly means only those disputed before the Tribunal.

[8] Elahi refers to this claim as one for relief under 28 U.S.C. § 1610(f)(1)(A), as amended by TRIA. We find it clearer to refer to it as attachment under TRIA. TRIA's text does not expressly reinvigorate § 1610(f)(1)(A) from President Clinton's waiver, *see* Pres. Determ. No. 2001-03, 65 Fed. Reg. 66483 (Oct. 28, 2000), despite TRIA's legislative history showing an intent to "build[ ] upon and extend[ ] the principles in section 1610(f)(1) of the Foreign Sovereign Immunities Act," by "eliminat[ing] the effect of any Presidential waiver . . . purporting to bar or restrict enforcement of such judgments, thereby making clear that all such judgments are enforceable against any assets or property under any authorities referenced in Section 1610(f)(1)." H.R. Conf. Rep. No. 107-779 at 27 (Nov. 13, 2002), *reprinted in* 2002 U.S.C.C.A.N. 1430, 1434.

> claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (alteration in original).

Elahi's claim for relief under TRIA § 201(a) turns on two factors: (1) whether Iran is a "terrorist party" under that statute and (2) whether the Cubic judgment is a "blocked asset." The first factor is easily answered. TRIA includes within its definition of "terrorist party" a foreign state "designated as a state sponsor of terrorism" by the Secretary of State. TRIA § 201(d)(4). Iran is subject to this definition, having been designated by Secretary of State George Shultz as a state sponsor of terrorism. *See* Secretarial Determ. 84-3, 49 Fed. Reg. 2836-02 (January 23, 1984).

We therefore turn to the second factor, whether the Cubic judgment fits within TRIA's definition of a blocked asset. TRIA defines "blocked asset" to mean "any asset seized or frozen by the United States . . . under sections 202 and 203 of the International Emergency Economic Powers Act [("IEEPA")] (50 U.S.C.

§§ 1701, 1702)." TRIA § 201(d) (2)(A). The IEEPA grants the President broad authority[9] to regulate for-

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[9] 50 U.S.C. § 1702(a)(1) grants the President the following powers:

> (a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit—
>
> (i) any transactions in foreign exchange,
>
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> (iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;
>
> (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and
>
> (C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the

eign assets when faced with "an unusual and extraordinary threat" related to a declared national emergency. 50 U.S.C. § 1701(b). Following the hostage crisis in 1979, President Carter exercised his authority under IEEPA to freeze Iranian assets in the United States:

> I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). He delegated to the Secretary of the Treasury his authority under IEEPA to carry out this Order. *Id.* Pursuant to that authority, the Treasury Department issued the Iranian Assets Control Regulations, 45 Fed. Reg. 24,432 (Apr. 9, 1980), codified at 31 C.F.R. part 535. Particularly relevant here is 31 C.F.R. § 535.201, which blocked the transfer of goods to Iran:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after [November 14, 1979] Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

31 C.F.R. § 535.201 (1980). Subsequently, President Carter issued Executive Order 12,282, which unblocked

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> interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

assets in which Iran acquired an interest after January 19, 1981. Exec. Order 12,282, 46 Fed. Reg. 7925 (Jan. 19, 1981). However, Executive Order 12,170 and 31 C.F.R. § 535.201 have never been unblocked or revoked. *See Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 67 (E.D. N.Y. 2004).

The Ministry argues that the Cubic judgment is not a blocked asset under TRIA because Executive Order 12,282 unblocked certain Iranian assets. In support of its argument, MOD cites two cases in which district courts found that TRIA did not permit the attachment of Iranian property because the assets at issue did not fall within TRIA's definition of "blocked assets." *See Bank of New York v. Rubin*, 2006 WL 633315 (S.D. N.Y. Mar. 15, 2006); *Weinstein*, 299 F. Supp. 2d 63. However, the reasoning in those cases is inapplicable here. Iran's interest in the properties in question in *Rubin* and *Weinstein* arose after January 19, 1981, so Executive Order 12,282 unblocked those assets. In contrast, Iran's interest in the ACMR arose in October 1977 when Iran executed the contracts with Cubic or at the latest by October 4, 1978 when Iran made a payment of approximately $12,900,000 on the contracts. *See MOD v. Cubic*, 29 F. Supp. 2d at 1170. Indeed, as both *Rubin* and *Weinstein* acknowledge, no action by the executive branch has ever unblocked the assets in which Iran has an interest that antedates the Revolution, as its interest in the Cubic judgment does in this case. *See, e.g., Weinstein*, 299 F. Supp. 2d at 67 (noting that assets pre-dating January 19, 1981 continue to be blocked by 31 C.F.R. § 535.201, "which the parties concede ha[s] never been expressly revoked or repealed").

In sum, we find that the Cubic judgment is a "blocked asset" under TRIA because it represents Iran's interest in an asset "seized or frozen by the United States . . . under sections 202 and 203 of the International Emergency Economic Powers Act." TRIA § 201(d)(2)(A). Because TRIA § 201(a) waives attachment immunity for such blocked assets, we hold that Elahi may attach the Cubic judgment.

3. MOD's status under FSIA

The Supreme Court's remand order asks us to determine the status of MOD. We answer that question although it is relevant only if our determination, either that the Cubic judgment is a blocked asset or that Elahi did not waive his right to attach the judgment under the Victims Protection Act, is in error.

All parties agree that, at a minimum, MOD is a "foreign state" for purposes of FSIA and that, as such, its assets would be subject to attachment under the narrow set of circumstances set forth in § 1610(a). The disputed question is whether MOD is an "agency or instrumentality" whose property is subject to attachment under the broader set of exceptions contained in § 1610(b). The answer turns on whether the entity, here the Ministry, is a "separate legal person." 28 U.S.C. § 1603(b).

In answering this question, some courts have created a "characteristics" test, asking whether, under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, and hold property in its own name. *See Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 684 (S.D. N.Y. 1996); *Bowers v. Transportes Navieros Ecuadorianos*, 719 F. Supp. 166, 170 (S.D. N.Y. 1989). On the other hand, circuit courts have adopted a "core functions" test, asking

whether the defendant is "an integral part of a foreign state's political structure" or, by contrast, "an entity whose structure and function is predominantly commercial." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) (internal quotation marks and alterations omitted); *see also Garb v. Republic of Poland*, 440 F.3d 579, 594 (2d Cir. 2006); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003); *Magness v. Russian Fed'n*, 247 F.3d 609, 613 n.7 (5th Cir. 2001). The United States, in its briefing as *amicus curiae*, urges us to adopt the core functions test.

In *Transaero*, the D.C. Circuit considered whether the Bolivian Air Force constitued a part of the Bolivian state or an agency or instrumentality of that state for purposes of service of process under FSIA. Considering FSIA's purpose, the court noted that FSIA codified the "restrictive" approach to sovereign immunity in which immunity is "repealed" for commercial acts and "preserved" for "inherently sovereign or public acts." *Transaero*, 30 F.3d at 151; *accord Republic of Austria v. Altmann*, 541 U.S. 677, 690-91 (2004) (In passing FSIA, Congress's intent was to codify the "restrictive" theory of sovereign immunity, according to which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."). The D.C. Circuit found this "restrictive" approach to support a "core functions" test. Construing narrowly legislative history that would support applying the characteristics test, the D.C. Circuit pointed out that the characteristics test suffered a serious defect: Because "any nation may well find it convenient (as does ours) to give powers of contract and litigation to entities that on any reasonable view must count as part of the state itself," almost any

arm of the state would be considered instrumentalities. *Transaero*, 30 F.3d at 151 (noting that under the legislative history test, the United States Departments of State and Defense would count as instrumentalities). We agree. A foreign state is nothing more than the sum of its parts; in other words, like the United States, the state of Iran exists only through its head of state, its ministries, and the myriad administrative offices that collectively embody a sovereign state. More importantly, the foreign state can act only through these entities.

We add that it is illogical to distinguish between a "foreign state" and "agency and instrumentality" on the basis that the latter is a "separate legal person" while the former is not. A central purpose of FSIA was to specify the circumstances under which the federal courts could assert jurisdiction over a foreign state. Thus, the Act *presupposes* that a "foreign state" is capable of suing and being sued. Indeed, in numerous provisions, the Act explicitly anticipates legal actions brought by or against foreign states. *See* 28 U.S.C. § 1605 (enumerating circumstances in which "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States"); *id.* § 1608 (specifying the manner in which to serve process "upon a foreign state or a political subdivision"); *id.* § 1607 (limiting immunity from counterclaims in "any action brought by a foreign state, or in which a foreign state intervenes"). If the touchstone of an "agency or instrumentality" is whether it can sue or be sued, then these provisions of FSIA become superfluous, thereby undermining the two-tiered scheme of immunity and liability that Congress sought to impose.

We adopt the "core functions" test as the appropriate benchmark for deciding whether an entity should be viewed as a "foreign state" or as an "agency or instrumentality." This analysis has been adopted by each of our sister circuits which has considered the issue, *see Garb*, 440 F.3d at 594; *Roeder*, 333 F.3d at 234; *Magness*, 247 F.3d at 613 n.7, and it is consistent with the purpose and structure of FSIA.

The question thus becomes whether MOD is inherently a part of the political state or a commercial actor. As the D.C. Circuit observed in *Transaero*, "the powers to declare and wage war" are so intimately connected to a state's sovereignty that "it is hard to see what would count as the 'foreign state' if its armed forces do not." 30 F.3d at 153. We find this reasoning persuasive, although we decline to adopt the D.C. Circuit's categorical rule that the armed forces will always be a part of the foreign state itself. *See id.* It is possible to imagine situations in which a state would "subcontract" its defense to paramilitary groups or mercenary forces that would not properly count as part of the state but rather as "separate legal person[s]." However, we adopt a strong presumption that the armed forces constitute a part of the foreign state itself, and that presumption has not been rebutted here.

Here, Elahi has presented no evidence that MOD is a "separately constituted legal entity" distinct from the Iranian state. *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba* (*Bancec*), 462 U.S. 611, 624 (1983).[10] He has not established that MOD is "primarily

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[10] We do not imply, by mentioning the *Bancec* factors, that a litigant could overcome the presumption that the armed forces constitute a part of the state through a showing that would satisfy the *Bancec* test for in-

responsible for its own finances," that it is run as a "distinct economic enterprise," that it operates with "independence from close political control," or that it exhibits any of the traits—other than the capacity to sue and be sued—that the Court has identified as characteristic of a "separately constituted legal entity." *Id.* As such, Elahi has failed to overcome the presumption that MOD constitutes an inherent part of the state of Iran.

A. Attachment of the property of a foreign state.

Although MOD is a "foreign state," Elahi asserts that he may still attach the Cubic judgment under 28 U.S.C. § 1610(a)(7). Under this provision, Elahi must satisfy two conditions. First, his judgment against Iran must "relate[ ] to a claim" brought "against a foreign state for personal injury or death that was caused by an act of . . . extrajudicial killing." *See id.* (incorporating by reference 28 U.S.C. § 1605(a)(7)). Elahi asserts, and MOD has no choice but to concede, that he has satisfied this requirement. Second, the property in dispute, *i.e.*, the Cubic judgment, must be "property . . . used for a commercial activity in the United States." *Id.* § 1610(a). The parties dispute whether Elahi has satisfied this second requirement.

Section 1610(a) provides that, under certain circumstances, "the property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution . . . upon a judgment entered by a court of the United States." 28 U.S.C. § 1610(a). Focusing on

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dependence of an instrumentality. We expressly decline to discuss what evidentiary showing would suffice to overcome this presumption, since it is not before us on these facts.

whether Iran's contract with Cubic constituted commercial activity, Elahi argues that the Cubic judgment was "used for commercial activity in the United States" because it "arose out of MOD's commercial activity." This analysis begs the question. Even assuming the Cubic contract constituted a commercial contract for sale of military goods and services, we are still faced with the question posed by § 1610(a) on the use to which MOD has put the judgment. The source of the property is not determinative and "the mere fact that the property has a nexus or connection to a commercial activity in the United States is insufficient." *Af-Cap Inc. v. Chevron Overseas Ltd.*, 475 F.3d 1080, 1094 (9th Cir. 2007) (internal quotation marks omitted); *accord Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 253 (5th Cir. 2002); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36-37 (3d Cir. 1985) (rejecting an argument that property used to house the Libyan ambassador to the United Nations was subject to attachment under § 1610(a) because the property was acquired in a commercial transaction and reasoning that if "acquisition of property in a particular commercial transaction or act indelibly stamped the property as used for commercial activity, even foreign embassies and chancelleries would be subject to execution. Plainly Congress did not intend a result so inconsistent with recognized principles of international law.").

To satisfy § 1610(a), MOD must have used the Cubic judgment for a commercial activity in the United States, and this it has not done. We have recently stated that "property is 'used for a commercial activity in the United States' when it is put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to

a commercial activity." *Af-Cap Inc.*, 475 F.3d at 1091 (emphasis in original). Cautioning that "FSIA does not contemplate a strained analysis of the words 'used for' and 'commercial activity,' " we instructed courts to "consider[ ] the use of the property in question in a straightforward manner." *Id.* The Ministry has not used the Cubic judgment as security on a loan, as payment for goods, or in any other commercial activity. Instead, Iran intends to send the proceeds back to Iran for assimilation into MOD's general budget. Because repatriation into a ministry's budget does not constitute commercial activity, we hold that the Cubic judgment is not subject to attachment under § 1610(a).

CONCLUSION

We conclude that although Elahi may not attach the Cubic judgment under § 1610(a), he may do so under TRIA.

The judgment of the district court is **AFFIRMED.**

FISHER, Circuit Judge, dissenting:

When Dariush Elahi applied for and accepted $2.3 million from the United States Treasury under the Terrorism Risk Insurance Act of 2002 (TRIA), he relinquished the right to attach property at issue in claims against the United States before an international tribunal. *See* Pub. L. No. 107-297, § 201(d)(5)(B), 116 Stat. 2322, 2339. Iran's Ministry of Defense (MOD), and the United States as amicus curiae, argue that Elahi has relinquished his right to attach the Cubic judgment be-

cause it is "at issue" in Iran's Case B/61 before the United States-Iran Claims Tribunal.[1] I agree.

Case B/61 involves the status and disposition of Iranian military property and assets situated in the United States. One of the pieces of military equipment in dispute in Case B/61 is the Air Combat Maneuvering Range (ACMR), which MOD purchased from Cubic on October 3, 1977. Because Iran has already recovered $2.8 million from Cubic for damages arising out of the 1977 Cubic contract, the United States is entitled to use the Cubic judgment as a setoff against any award in Case B/61.

Although the Cubic judgment will affect the amount of money damages the United States will have to pay, the majority concludes that the Cubic judgment is not "at issue" in Case B/61 and can be attached by Elahi. As a result, the government—if found liable in Case B/61—will no longer have the benefit of the $2.8 million Cubic judgment that otherwise would be deducted by offset. Because the majority's interpretation of "at issue" contradicts the term's plain meaning and Congress' intent in passing TRIA, I respectfully dissent.

I. TRIA's Relinquishment Provision

By enacting TRIA in 2002, Congress expanded the class of judgment creditors eligible to receive payments from the United States Treasury for judgments awarded against "terrorist part[ies]." TRIA § 201(a). Sponsors expressed the hope that TRIA would provide American

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[1] Neither party disputes that the United States-Iran Claims Tribunal is an "international tribunal" for purposes of TRIA's relinquishment provision. *See Hegna v. Islamic Republic of Iran*, 402 F.3d 97, 99 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000, 1008-09 (7th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004).

victims previously denied compensation, such as Elahi, with "some measure of justice." 148 Cong. Rec. S11524-01, 11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin).

However, TRIA's justice comes at a cost. Those who receive partial compensation must agree to relinquish the right to execute or attach property "that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal," TRIA § 201(d)(5)(B), and recipients must sign an agreement stating:

> I hereby relinquish . . . all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.
>
> I understand that the relinquishment that I make in the event of any pro rata distribution is irrevocable once the payment is credited to the bank account I have identified in this application.

See Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran, 68 Fed. Reg. 8077-02, 8081 (Feb. 19, 2003).

When Elahi accepted TRIA funds in April 2003, he knew that he risked waiving the right to attach the Cubic judgment. As early as 2002 MOD argued before the district court that the Cubic judgment "is at issue in Case *B/61* between the United States and Iran in the Hague." *See Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 236 F. Supp. 2d 1140, 1146 (S.D. Cal. 2002) (quoting MOD's briefing). Although I am deeply sympathetic to

Elahi and his family for their personal loss, relinquishment of the right to attach the Cubic judgment is part of the bargain Elahi struck by accepting funds from the United States treasury.

II. Plain Meaning of "At Issue"

This case presents a question of statutory interpretation. As such, the first step is determining "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). For our purposes, the language at issue is "at issue."

When determining the plain meaning of language, we may consult dictionary definitions. *See Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088 (9th Cir. 2007). Black's Law Dictionary defines "at issue" as "[t]aking opposite sides; under dispute; in question." Black's Law Dictionary (8th ed. 2004). Similarly, the American Heritage Dictionary of the English Language (4th ed. 2000), defines "at issue" as "[i]n question; in dispute." It is evident from these definitions that Congress selected a term with a relatively broad meaning. *See Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004) (rejecting narrow interpretation of "at issue").[2]

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[2] Like the majority, my analysis is guided by the plain meaning of "at issue." *See* Op. at 6411 n.7. We part ways because the majority limits the term "property . . . at issue" to property that is the subject of a merits determination before the Claims Tribunal. *See id.* However, an issue is "in question" or "at issue" in a dispute even if it is not the subject of a merits determination. The effect of the Cubic judgment on the financial liability of the United States will be raised and adjudicated; that is sufficient to put the property "in question."

The Cubic judgment is at issue before the Claims Tribunal because—under any scenario—the Tribunal must determine the effect of the judgment on the amount of liability owed by the United States. Iran has voluntarily pledged to offset the $2.8 million Cubic judgment against any award it wins against the United States in Case B/61. If Iran keeps its promise, that will affect the Claims Tribunal's determination of the amount of damages the United States will have to pay Iran.

Significantly, even if Iran were to renege on its promise, the Cubic judgment would be at issue because the United States could then claim an entitlement to a setoff. Under Claims Tribunal precedent, a defending party may request a reduction of damages where the setoff arises from the same transaction or contract as the underlying claim. *See Computer Sciences Corp. v. Gov't of the Islamic Republic of Iran*, 10 Iran-U.S.C.T.R. 269 (Chamber 1 Apr. 16, 1986). The $2.8 million Cubic judgment—like Iran's underlying claim—arises from the 1977 contract between Iran and Cubic for the ACMR equipment. Moreover, the United States could also argue that offset is mandated by the doctrine of judicial estoppel. *See Rango Wagner Equip. Co. v. Iran Express Terminal Corp.*, 2 Iran-U.S.C.T.R. 141 (Chamber 3 Mar. 18, 1983) (finding Iran judicially estopped from asserting that Claims Tribunal lacked jurisdiction where it forwarded inconsistent position before American court).

Because the Claims Tribunal will have to consider the effect of the judgment on any award levied against the United States government, I must conclude that the Cubic judgment is "property that is at issue" before the Claims Tribunal.

III. Reading the Statute as a Whole

My conclusion is reinforced by reading TRIA as a whole. Because statutory provisions are not written in a vacuum, we should also examine TRIA's purpose and various provisions to understand the meaning of "at issue." *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc). There is no legislative history to guide us, but it is evident from the plain text of § 201 that TRIA's relinquishment provision was intended to prevent victims of terrorism who accept money from the federal treasury from attaching, executing on or making claims against property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals.

Acting on this understanding, other circuits have rebuffed attempts by applicants to attach Iranian property that might become the subject of an award against the United States before the Claims Tribunal. In *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004), the Fourth Circuit held that a family that accepted payment under TRIA relinquished its right to attach former Iranian diplomatic properties located in Bethesda, Maryland. The court held that such properties were "at issue" before the Claims Tribunal because Iran filed claims against the United States alleging that the federal government unlawfully "fail[ed] to grant Iran custody of its diplomatic and consular properties in the United States." *Id.* (citation and internal quotation marks omitted). Because Iran's claim remained pending before the Claims Tribunal, the court concluded that "it would appear rather straightforward that the Bethesda properties fall within the contours of the Hegnas' relinquishment." *Id.* In short, had the Hegnas succeeded in effec-

ting the sale of the properties to satisfy the balance of their judgment against Iran, the United States would then have had to compensate Iran for the value of those properties (if found liable to Iran), in effect covering the funds paid to the Hegnas through their attachment. This is the very result Congress intended to avoid through the relinquishment proviso.

Although Elahi's attachment involves cash rather than buildings, adherence to legislative intent results in the same outcome. Having already received TRIA funds from the United States treasury, Elahi should not be permitted to attach property that might otherwise be used to satisfy a judgment against the United States. As in *Hegna*, the only way to effectuate congressional intent is to prohibit Elahi from doing so.

IV. Iran's "Concession"

Although the majority's interpretation of "at issue" contradicts plain meaning and congressional intent, the majority is "persua[ded]" to hold in favor of Elahi because Iran "conceded" in briefing to the Claims Tribunal that the Cubic judgment and Case B/61 do not share identicality of subject matter. Op. at 6410. There are convincing reasons to be persuaded otherwise.

In its briefing to the Claims Tribunal, Iran argued against giving res judicata effect to the ICC's adjudication of its claim against Cubic because:

> [the ICC's] case and the present one lack three identities (identity of object, identity of parties, and identity of subject matter) required for that purpose. The object of this litigation, unlike that in the ICC lawsuit, is the United States' obligation under the Algiers Declarations to arrange for the transfer of the

> items to Iran. The opposing party in this Case is, obviously not a U.S. private company, but the United States' Government. The subject-matter of this Case, at variance with the ICC action, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties.

However, Iran's argument concerned the equitable doctrine of res judicata and therefore has little bearing on this court's exercise in statutory interpretation. Even if Iran were correct that the subject matter of Case B/61 is at variance with the ICC arbitration, it does not follow that the Cubic judgment is not at issue in Case B/61. "At issue" is not synonymous with identity of subject matter, a distinction that Congress clearly understood when it drafted TRIA.

TRIA's relinquishment provision prohibits applicants from attaching two different types of property: (1) property that is "*the subject of*" *resolved* claims before an international tribunal; and (2) property that is "*at issue*" when claims remain *pending*. "[T]he use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Sec. & Exch. Comm'n v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). By using the conceptually broader term "at issue," it is evident that Congress did not intend to limit the relinquishment provision strictly to property that is *the subject of* a pending claim before the Claims Tribunal.

Thus, the majority's rationale that the Cubic judgment is not at issue because Case B/61 addresses the federal government's liability for failing to restore frozen assets (including the ACMR), whereas the Cubic judgment reflects Cubic's liability for the non-delivery

of the ACMR, is wide of the mark. *See* Op. at 6410. The majority's observation is, of course, accurate but not dispositive of the relinquishment analysis. Because MOD's claim against the United States is still pending, the relevant question is not whether the Cubic judgment and Case B/61 share the same parties, causes of action or even the same "subject," but whether the Cubic judgment is "at issue" or "in question" in Case B/61. Because the Claims Tribunal will have to consider the impact of the Cubic judgment on the amount of liability owed by the United States, the answer to that question is yes.

By relying so heavily on Iran's argument—made in a different context to another tribunal—the majority rests its analysis on a shaky foundation. TRIA itself—its text and purpose—offers much firmer ground for an exercise in statutory interpretation. Adherence to established doctrines of statutory construction leads to the conclusion that Elahi relinquished his right to attach the Cubic judgment. I therefore respectfully dissent.

JOINT APPENDIX

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(8)

No. 07-615

Supreme Court, U.S.
FILED
SEP 8 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed November 7, 2007
Certiorari Granted June 23, 2008

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RELEVANT DOCKET ENTRIES

U.S. District Court
Southern District of California (San Diego)
CIVIL DOCKET FOR CASE
#: 3:98-cv-01165-B-CGA

Ministry of Defense v. Cubic Defense Sys, et al
Assigned to:
Judge Rudi M. Brewster
Referred to: Magistrate
Judge Cynthia G. Aaron
Demand: $0
Case in other court:
02-57043
03-55015
99-56380
99-56444
Cause: 09-1 U.S.
Arbitration Act

Date Filed: 06/25/1998
Date Terminated:
08/10/1999
Jury Demand: None
Nature of Suit:
190 Contract: Other
Jurisdiction: Diversity

Plaintiff
The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran
as Successor in Interest to the Ministry of War of the Government of Iran

V.

Defendant

Cubic Defense Systems, Inc.
as Successor in Interest to Cubic International Sales Corporation

Claimant
Jenny Rubin

Claimant
Daniel Miller

Claimant
Abraham Mendelson

Claimant
Stuart E Hersh

Claimant
Noam Rozenman

Claimant
Deborah Rubin

Claimant
Renay Frym

Claimant
Elena Rozenman

Claimant
Tzvi Rozenman

Intervenor Plaintiff
Stephen M Flatow
TERMINATED: 04/06/1999

Intervenor Plaintiff
Dariush Elahi

Date Filed	#	Docket Text
06/25/1998	1	Petition for order confirming foreign arbitral award by plaintiff Ministry of Defense (referred to Magistrate Cynthia G. Aaron) Receipt No/Amt of Fee: #039817, $150 (llb) (Entered: 06/26/1998)

06/25/1998	2	Notice of Application by plaintiff Ministry of Defense for petition for order confirming foreign arbitral award (jrl) (Entered: 06/29/1998)
06/25/1998	3	Declaration of Mina Almassi for plaintiff Ministry of Defense re application [2-1] (jrl) (Entered: 06/29/1998)

* * *

10/09/1998	13	Notice of cross motion and cross Motion by defendant Cubic Defense Sys to vacate the 5/5/97 ICC arbitration award [motion referred to Judge Rudi M. Brewster]; motion hrg set for 11/16/98 at 10:30; t/w prf of svc (jrl) (Entered: 10/13/1998)

* * *

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* * *

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* * *

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09/13/2002 86 Declaration of Dr. Assadollah Karimi by plaintiff Ministry of Defense in support of petitioner's motions for judicial determination that its judgment against cubic defense systems is immune from attachment or execution by Stephen

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09/13/2002 87 Request for Judicial Notice by plaintiff Ministry of Defense in support of petitioner's motions for judicial determination that its judgment against cubic defense systems is immune from attachment or execution by Stephen M. Flatow and Dariush Elahi (axr) (Entered: 09/16/2002)

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judicial determination that its judgment against cubic defense systems is immune from attachment or execution by Stephen M. Flatow [81-1] (NUNC PRO TUNC 10/21/02) (axr) (Entered: 10/30/2002)

* * *

11/04/2002 103 Supplemental Brief Filed by plaintiff Ministry of Defense regarding motion for judicial determination that its judgment against cubic defense systems is immune from attachment or execution by Dariush Elahi [83-1], regarding motion for judicial determination that its judgment against cubic defense systems is immune from attachment or execution by Stephen M. Flatow [81-1] (NUNC PRO TUNC 10/30/02) (axr) (Entered: 11/04/2002)

* * *

11/19/2002 106 Reply of Dariush Elahi to supplemental brief of petitioner with respect to its motion for judicial determination (NUNC PRO TUNC 11/14/02) (axr) (Entered: 11/19/2002)

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that its judgment against cubic defense systems is immune from attachment or execution by Stephen M. Flatow [81-1]; the court orders the clerk to strike the notice of lien filed by Mr. Flatow on 4/6/99 (axr) (Entered: 11/27/2002)

* * *

12/24/2002 115 Notice of appeal by plaintiff Ministry of Defense from Dist. Court decision entered on 11/26/02. Receipt No/Amt of Fee: #089822/$105 [107-1] (dkt clerk) (Entered: 12/27/2002)

* * *

05/16/2003 124 Notice of lien in the amt of $5,000,000 against any distribution of the judgment by France Mokhateb Rafii (axr) Modified on 05/21/2003 (Entered: 05/19/2003)

* * *

10/30/2003 130 Notice by claimants Jenny Rubin, Daniel Miller, Abraham Mendelson, Stuart E Hersh, Noam Rozenman, Deborah Rubin, Renay Frym, Elena Rozenman, Tzvi Rozeman of filing liens against any distribution of the judgment in this matter to the creditor, the Ministry of Defense and support for the Armed Forces of the Islamic Republic of Iran. (mam) (Entered: 11/04/2003)

* * *

12/14/2004 134 Certified copy of judgment from USCA affirming the decision of the District Court re: appeal [115-1], affirming the decision of the District Court re: appeal [110-1], affirming the decision of the District Court re: appeal [58-1] (dkt clerk) (Entered: 12/14/2004)

01/25/2005 Clerk's original record returned from USCA [57-1]: 7 vol and 3 transcripts (dkt clerk) (Entered: 1/25/2004)

01/29/2007 135 ORDER of USCA as to 52 Notice of Appeal filed by Cubic Defense Systems, Inc., 57 Notice of Appeal filed by The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran: 01/16/07 Telephonic Conference continued to 02/08/07 at 10:00 am. Otherwise, the stay ordered on 11/02/01 remains in effect. (jxj) (Entered: 01/29/2007)

05/29/2007 136 ORDER of USCA as to 52 Notice of Appeal filed by Cubic Defense Systems, Inc., 57 Notice of Appeal filed by The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran: The USCA will initiate a further conference by telephone on 9/25/2007, at 11:00 AM Pacific Time. The briefing schedule remains vacated. (mkz) (Entered: 05/30/2007)

08/13/2007 137 NOTICE of Spreading the Mandate on petition requisite to filing certified copy of judgment from U.S. Court of Appeals, Case Number 03-55015, AFFIRMING the decision of U.S. District Court, Southern District of California. Appeal Mandate Hearing set for 9/10/2007 09:00 AM in Courtroom 2 before Judge Rudi M. Brewster. The Court informs the parties that the spreading of the mandate upon the minutes of the district court record is a ministerial task in which the appellate court's decision is filed and the case is returned to the jurisdiction of the district court. If this Courts decision has been affirmed and no additional proceedings in this court are necessary, the parties are not required to attend the hearing. If this Court's decision has been reversed, however, the parties shall attend the hearing and should be prepared to discuss the status of the litigation and their suggestions on how to proceed (mjm) (Entered: 08/13/2007)

09/10/2007 138 NOTICE re Appeal 115. Appeal Mandate Hearing, re U.S.C.A. NO. 03-55015, set for 9/10/07 – not held, no parties appearing. The certified copy of the judgment from U.S. Court of Appeals AFFIRMING the decision of U.S. District Court, Southern District of California is

FILED. The case is returned to the jurisdiction of the District Court. (Court Reporter N/A). (Plaintiff Attorney N/A). (Defendant Attorney N/A). (mjm) (Entered: 09/10/2007)

09/10/2007 139 USCA JUDGMENT (certified copy) Affirming the decision of the USDC re 115 Appeal. (mkz) (Entered: 09/11/2007)

* * *

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals
Docket #: 03-55015
Nature of Suit: 4190 Other Contract Actions Ministry of Defense, et al. v. Elahi
Appeal From: US District Court for Southern California, San Diego

Docketed: 01/03/2003
Termed: 05/30/2007

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, as Successor in Interest to the Ministry of War of the Government of Iran,

Plaintiff-Appellant

v.

CUBIC DEFENSE SYSTEMS, INC., as Successor in Interest to Cubic International Sales Corporation,

Defendant

v.

STEPHEN M FLATOW,

Plaintiff-intervenor

and

DARIUSH ELAHI,

Plaintiff-intervenor-Appellee

UNITED STATES OF AMERICA,

Amicus Curiae

01/03/2003	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 1/10/03; appellant's designation of RT is due 1/3/03; appellee's designation of RT is due 1/13/03; appellant shall order transcript by 1/23/03; court reporter shall file transcript in DC by 2/24/03; certificate of record shall be filed by 3/3/03 ; appellant's opening brief is due 4/11/03; appellee's brief is due 5/12/03; appellants' reply brief is due 5/27/03. [03-55015]
		* * *
04/11/2003	8	Filed original and 15 copies Appellant Ministry of Defense's opening brief (Informal: n) 40 pages and five excerpts of record in 1 volumes; served on 4/11/03 [03-55015]
		* * *
05/30/2003	14	Filed original and 15 copies appellee Dariush Elahi's 52 pages brief; served on 5/28/03 [03-55015]
		* * *
09/10/2003	26	Filed original and 15 copies Ministry of Defense in 03-55015 reply brief, (Informal: n) 29 pages; served on 9/9/03 [03-55015]
		* * *

06/22/2004	42	ARGUED AND SUBMITTED TO Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER [99-56498, 02-57043, 03-55015]
10/07/2004	47	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Betty B. FLETCHER, author; Kim M. WARDLAW; Raymond C. FISHER.) FILED AND ENTERED JUDGMENT. [99-56498, 02-57043, 03-55015]
10/21/2004	48	[5212636] Filed original and 3 copies Appellant Ministry of Defense's petition for rehearing, (PANEL) 11 p.pages, served on 10/20/04 [03-55015]
10/21/2004	49	Filed Appellee Dariush Elahi's bill of costs, served on 10/20/04 TOTAL: $228.00 [03-55015]
11/17/2004	51	Filed order (Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER,): denying petition for panel rehearing [5212636-1] [03-55015]

* * *

02/22/2005	55	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 04-1095 filed on 2/15/05. (PANEL) [99-56498, 02-57043, 03-55015]

02/28/2006	57	Received copy of Supreme Court per curiam opinion dated 2/21/06: we vacate the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion. (PANEL) [99-56498, 02-57043, 03-55015]

* * *

05/02/2006	62	Filed order (Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER,): Pursuant to the Supreme Court's remand in Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 126 C. Ct. 1193 (2006) (per curiam), the panel directs the parties to file suppl br addressing the following questions: 1) Is the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD") an "agency or instrumentality of a foreign state" under 28 USC 1610(b)(2), or a "foreign state" under 28 USC 1610(a), or neither? 2) Is it necessary to conduct further proceedings in the dc – including, but not limited to, an evidentiary hearing – to develop the factual record in order to determine whether MOD is an "agency or instrumentality of a foreign state" under 28 USC 1610(b)(2), or a "foreign state" under 28 USC 1610(a), or neither? 3) Did

this panel properly hold that the MOD had not waived its claim to sovereign immunity? 4) Are there any grounds not addressed in our previous opinion, see 385 F 3d 1206, 1220 n.16 (9th Cir. 2005), that establish an exception to the MOD's claim of immunity? Briefs are due 21 days from the date of this order. The briefs shall not exceed 25 pages. [03-55015]

05/23/2006 64 Filed original and 15 copies Appellant Ministry of Defense supplemental brief of 23 pages, served on 5/23/06 PANEL [03-55015]

05/30/2006 65 Filed original and 15 copies Appellee Dariush Elahi supplemental brief of 20 pages, served on 5/23/06 PANEL

06/13/2006 66 Filed Appellant Ministry of Defense's motion for leave to file a supplemental rejoinder; served on 6/12/06 [5855103] (to PANEL) [03-55015]

06/13/2006 67 Received original and 4 copies Appellant Ministry of Defense's "supplemental rejoinder," 11 pages, served on 6/12/06 (to PANEL) [03-55015]

06/23/2006 68 Filed aples opposition to aplts mtn for leave to file a supp rejoinder, served on 6/22/06 PANEL [03-55015]

06/23/2006	69	Received possible USA amici letter dated 6/21/06 re: The US Govt may file an amici brief no later than 7/14/06. PANEL [03-55015]
06/30/2006	72	Filed order MOATT (MCD) This court is in receipt of the Justice Dept's letter dated 6/21/06. The Dept is advised that the panel will defer action until 7/14/06 or sooner if it receives an amicus brief from the government. If the govt does submit an amicus brief, it should be accompanied by a motion for leave to file it. (PHONED/FAXED ALL COUNSEL) [03-55015]
07/14/2006	73	Filed Amicus USA unopposed mtn for leave to file amici brief in support of reversal. [03-55015] served on 7/13/06 PANEL W/BRIEF.
07/14/2006	75	Received Amicus USA brief in 15 copies of 25 pages; deficient: mtn to file w/ panel ;served on 7/13/06 PANEL W/MTN TO FILE. [03-55015]
07/26/2006	76	Filed Appellee Dariush Elahi's response in support of USA motion to become amicus and request to file supplemental br; served on 7/25/06 (PANEL) [03-55015]
08/01/2006	77	Filed order (Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER,): We grant the US unopposed mtn for leave to file amicus curiae br in support of reversal. [5886135-1] The parties may file

		further simultaneous br addressing the govt's assertion that Elahi has relinquished any right he has to attach property under the Foreign Sovereign Immunities Act by accepting compensation under the Victims of Trafficking and Violence Protection Act of 2000 Briefs shall not exceed 15 pages in length and must be filed on or before 8/15/06. PHONED [03-55015]
08/01/2006	78	Filed original and 15 copies USA's amicus brief of 25 pages; served on 7/13/06 [03-55015]
08/01/2006	80	Filed order (Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER,): We grant aplt's mtn for leave to file a suppl rejoinder. we order the clerk to file aplt's suppl rejoinder that has been recd. [5855103-1] Aple Elahi may file an addl suppl br in response to aplt's suppl rejoinder. The br shall not exceed 10 pages in length and must be filed on or before 8/15/06. PHONED [03-55015]
08/01/2006	81	Filed original and 4 copies Appellant Ministry of Defense supplemental brief (rejoinder) of 11 pages, served on 6/12/06 [03-55015]
08/15/2006	82	Filed original and 15 copies Appellee Dariush Elahi supplemental brief of 10 pages in response to

MOD's suppl rejoinder, served on 8/14/06 PANEL [03-55015]

08/15/2006 83 Filed original and 15 copies Appellee Dariush Elahi supplemental brief of 13 pages in response to amicus br os US, served on 8/14/06 PANEL [03-55015]

08/15/2006 84 Filed original and 15 copies Appellant Ministry of Defense supplemental brief of 12 pages in response to amicus br, served on 8/14/06 PANEL [03-55015] REPLACED BY BRIEF FILED 8/25/06

08/22/2006 85 Filed Appellant Ministry of Defense's motion to file substitute/ corrected brief. [03-55015] served on 8/21/06 [5926027] PANEL [03-55015]

08/2[illegible]/2006 86 Received original and 15 copies Appellant's substitute brief of 15 pages (suppl br on relinquishment); served on 8/21/06 PANEL [03-55015]

08/25/2006 87 Filed order (Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER,): granting appellant's motion file substitute/corrected brief [5926027-1] [03-55015]

08/25/2006 88 Filed original and 15 copies Appellant Ministry of Defense supplemental brief on relinquishment of 15 pages, served on 8/21/06 PANEL [03-55015]

* * *

11/30/2006	99	CALENDARED: Pas January 26, 2007 10:00 AM Courtroom 1 [03-55015]
01/26/2007	102	ARGUED AND SUBMITTED TO Betty B. FLETCHER, Kim M. WARD-LAW, Raymond C. Fisher [03-55015]
02/01/2007	103	Filed amici USA additional citations, served on 1/30/07 PANEL [03-55015]
02/07/2007	105	Received Jonathan R. Mook for Appellee Dariush Elahi letter dated 2/6/07 re: response to addl citation PANEL [03-55015]
05/30/2007	107	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral hearing; Affirmed; Written, Signed, Published. Betty B. FLETCHER, author; Kim M. WARDLAW; Raymond C. FISHER, dissenting.) FILED AND ENTERED JUDGMENT. [03-55015]
06/12/2007	108	Filed Appellee Dariush Elahi bill of costs, served on 6/11/07 TOTAL: $194 [03-55015]
06/13/2007	109	[6202929] Filed original and 50 copies Appellant Ministry of Defense petition for panel rehearing and petition for rehearing en banc 15 p.pages, served on 6/12/07 PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES [03-55015]
06/20/2007	110	Filed original and 50 copies USA amicus brief in support of rehearing, of 14 pages ;served on 6/19/07 PANEL AND ALL ACTIVE JUDGES

		AND ANY INTERESTED SENIOR JUDGES [03-55015]
07/17/2007	113	Filed order (Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER,): The opinion filed on 5/30/07 is amended (see TEXT) . . . The petition for rehearing en banc is denied. No further petitions for rehearing or for rehearing en banc may be filed. [03-55015]
07/17/2007	114	Amended OPINION FILED (Betty B. FLETCHER, Kim M. WARDLAW, Raymond C. FISHER,): AFFIRMED [03-55015]
07/26/2007	115	MANDATE ISSUED with costs taxed against aplt in the amount of $194 [03-55015]
10/01/2007	116	Received letter from the Supreme Court dated 9/24/07 re: writ of cert ext to 11/14/07 . [03-55015]
11/13/2007	117	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 07-615 filed on 11/7/07. [03-55015]
06/27/2008	118	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/23/2008. Supreme Court Number 07-615

Mina Almassi, Esq.
California State Bar No. 153858
11347 Nebraska Avenue, Suite 110
Los Angeles, California 90025
Tel. (310) 473-7411

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CIVIL DIVISION

The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, as Successor in Interest to the Ministry of War of the Government of Iran, Petitioner vs. Cubic Defense Systems, Inc., as Successor in Interest to Cubic International Sales Corporation, Respondent	PETITION FOR ORDER CONFIRMING FOREIGN ARBITRAL AWARD [9 USCS §207] (Filed Jun. 25, 1998)

Petitioner, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MODSAF-IRI"), as successor in interest to the Ministry of War of the Government of Iran ("MOW"), respectfully alleges:

I

Petitioner, MODSAF-IRI, is a constituent part of the Islamic Republic of Iran.

II

Respondent, Cubic Defense Systems, Inc. ("Cubic"), is a United States corporation, and a wholly-owned subsidiary of Cubic Corporation, also a United States corporation, organized and existing under the laws of the State of Delaware. Cubic is the successor in interest to Cubic International Sales Corporation, with its principal place of business at 9233 Balboa Avenue, San Diego, California 92138, and within the Southern District of the State of California.

III

This proceeding arises under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, and under Chapter 2 of Title 9, United States Code, and particularly Section 207 thereof. The jurisdiction of this Court arises under Section 203 of Title 9, United States Code.

IV

On October 23, 1977, Petitioner and Respondent entered into two written contracts. One contract, the Sales Contract, was for the sale of necessary subsystems and support equipment that comprise an Air Combat Maneuvering Range ("ACMR") for use by the

Iranian Air Force. The other contract, the Service Contract, was for the installation and integration in Iran of said military equipment by Respondent's specialists and technicians. The contracts, by their terms, were to be enforceable under the laws of the Government of Iran. In Article 15 of the Sales Contract and Article 18 of the Service Contract, Petitioner and Respondent agreed to settle disputes by arbitration in the City of Zurich, Switzerland. [Certified copies of the original contracts are attached hereto, marked as Exhibits 1 and 2, and made a part hereof.]

V

Switzerland and the United States of America are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

VI

The contracts evidence transactions involving commerce with a foreign nation, as shown by the following facts:

The Sales Contract relates to Cubic's sale of subsystems and support equipment which comprise an ACMR, for use by the Iranian Air Force. The Service Contract relates to Cubic's installation and integration of said military equipment in Iran. Both

contracts were executed by the MOW as the purchaser and Cubic as the supplier.

VII

In Article 15 of the Sales Contract and in Article 18 of the Service Contract, the parties agreed to arbitrate, in the City of Zurich, Switzerland, all or any differences which arise with respect to the contract, as follows:

> *"ARBITRATION*
>
> (a) GENERAL. Any controversy, dispute or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration in the City of Zurich, Switzerland, in accordance with the laws of the Government of Iran in effect as of the date of this contract.
>
> (b) NOTICE. In the event the parties are unable to resolve any such dispute, controversy, or claim, either party may give written notice to the other of their intent to submit the matter to arbitration.
>
> (c) COST OF ARBITRATION. The cost of arbitration shall be paid by the losing party."

VIII

The Sales Contract and the Service Contract between MOW and Cubic were closely interlinked and interdependent, and constituted a single unit to the extent that the performance of the Service

Contract was a condition to the performance of the Sales Contract. Thus, the Sales Contract provided for progress payments upon completion of a specified portion of work. MOW paid to Cubic US$12,608,519.00 of the amount due under the Sales Contract and US$302,857.00 under the Service Contract.

Cubic breached the Service Contract by evacuating its specialists from Iran, and MOW never took delivery of the military system and equipment, as was promised in the Sales Contract. The contracts were never reconciled. After the revolution of 1979 in Iran, MODSAF-IRI expressed its willingness to sell the systems to a third party through Cubic. This offer was accepted by Cubic. However, without notifying MODSAF-IRI, Cubic sold the goods and never supplied MODSAF-IRI with the details of the subsequent sale. Therefore, Cubic retained the purchase money from MODSAF-IRI, but never gave the goods to MODSAF-IRI. These actions gave rise to the dispute which was the subject of the arbitration in Zurich, Switzerland.

IX

Petitioner sent numerous correspondences to Respondent for amicable negotiations, but Respondent failed to respond. On or about January 19, 1982, Petitioner filed a claim against Respondent at the Iran-United States Claims Tribunal at The Hague ("the Tribunal"). On or about April 28, 1987, the

Tribunal issued an Order stating its lack of jurisdiction to hear the matter.

X

On August 14, 1991, Petitioner sent to Respondent a written notice of dispute and the invocation of arbitration. Petitioner thereupon proceeded to arbitration in accordance with the terms of the arbitration agreement.

XI

On September 24, 1991, Petitioner filed its Request for Arbitration before the Court of Arbitration of the International Chamber of Commerce ("ICC"). In its Request for Arbitration, Petitioner proposed that the Arbitral Tribunal be composed of three arbitrators. Each party was to appoint its own arbitrator and the third arbitrator was to be nominated 45 days after the appointment of the party-appointed arbitrators.

XII

On or about April 1, 1992, Respondent appointed Mr. Richard M. Mosk as its Arbitrator. On or about October 27, 1992, Petitioner appointed Dr. Seyed-Jamal Seifi as its Arbitrator. Both appointments were duly confirmed by the ICC.

The two Arbitrators could not agree on the selection of the Chairman. Finally, on or about April 14,

1993, Mr. Richard M. Mosk, Respondent's Arbitrator, notified the ICC that the two Arbitrators were unable to select the Chairman and requested that the ICC appoint the same.

On or about May 6, 1993, Dr. Werner Wenger was appointed by the ICC to preside as Chairman.

XIII

On March 6, 1992, Petitioner filed its Reply to Respondent's Answer and Counterclaim.

XIV

On July 14, 1993, a prehearing conference was held at which the Terms of Reference were discussed and eventually executed.

XV

On August 11, 1993, pursuant to Article 7.1(c) and Articles 7.3 to 7.6 of the Terms of Reference, as well as according to the procedural arrangements discussed at the prehearing conference of July 14, 1993, the Arbitral Tribunal ordered a bifurcation, pursuant to which the issue of quantification of the Claim and Counterclaim, respectively, be deferred. Accordingly, each party was advised to simultaneously file its Amended Statement of Claim or Counterclaim, respectively setting forth all factual and legal grounds of such claim, and offering evidence in support

thereof, only with the exception of the quantification of the Claim and Counterclaim.

XVI

On January 17, 1994, Petitioner filed its Statement of Claim, and Respondent filed its Statement of Defense and Counterclaim.

XVII

On March 7, 1994, the Tribunal ruled that Petitioner's requests for discovery appeared to be premature at this stage of the proceeding since they were relevant only to the quantification.

XVIII

On April 21, 1994, Petitioner filed a Rebuttal Statement and Answer to the Counterclaim, and Respondent filed its Rebuttal Statement.

XIX

On June 13, 14 and 15, 1994, a first hearing ("Hearing I") was held in Zurich. At Hearing I, oral argument by Counsel was heard on all issues identified in Article 4 of the Terms of Reference, with the exception of the quantification of the Claim and Counterclaim, respectively.

XX

On November 22, 1994, the Tribunal ordered an exchange of Parties' Post-Hearing Briefs with respect to the statute of limitations and to the legal argument only on that subject matter.

XXI

On December 19, 1994, Petitioner filed its Post-hearing Brief.

XXII

On January 20, 1995, Respondent filed its Post-hearing Brief.

XXIII

On April 6, 1995, in consideration of the Post-hearing Briefs of the parties, the majority of the Tribunal ruled that both the Petitioner's Request for Arbitration with respect to its Claim for Reimbursement and Cubic's Counterclaim for damages were not time-barred by the applicable statute of limitations under Iranian law.

XXIV

Simultaneously, the Tribunal ordered that the bifurcation of the proceedings was no longer applicable.

XXV

On June 30, 1995, Respondent submitted its Discovery Memorandum.

XXVI

On August 28, 1995, Petitioner filed its Statement of Quantification, and Respondent filed its Statement of Quantification.

XXVII

On October 24, 1995, Petitioner filed its Comments on Respondent's Statement of Quantification, and Respondent filed its Comments on Petitioner's Statement of Quantification.

XXVIII

From November 7 to 9, 1995, a second and final hearing ("Hearing II") was held in Zurich at which opportunity was given to both parties to address legal arguments relating to the liability issues. The question of whether or not the contracts were terminated either by operation of law or by mutual consent, and the parties' positions with respect to the quantification of their respective claims were the main subjects during Hearing II.

XXIX

On December 1, 1995, the Tribunal ordered a further exchange of the parties' Post-hearing Briefs with respect to the evidence relating to the quantification, taking into account the various liability theories still being contended by the parties.

XXX

On March 28, 1996, Petitioner filed its Post-hearing Brief commenting on the evidence relating to the quantification of the Claim and Counterclaim, and Respondent filed its Post-hearing Brief commenting on the evidence relating to the quantification of the Claim and Counterclaim.

XXXI

On May 5, 1997, the Arbitral Tribunal, deciding in accordance with the provisions of the ICC Rules of Conciliation and Arbitration, rendered the following Final Award:

> "Cubic Defense Systems, Inc. shall pay to the Islamic Republic of Iran the amount of US$2,808,519.00, together with simple interest on said amount at the rate of 12% per annum as from September 24, 1991 until the date of the Final Award."

[A certified copy of the original award is attached hereto, marked as Exhibit 3, and made a part hereof].

Paragraph 20.5 of the Final Award also provides that:

> "Iran is entitled to a reimbursement, by Cubic, in the amount of USD$60,000.00 since such amount has been advanced by Iran in excess of its 50% share in the parties' cost deposits as ordered by the ICC Court."

XXXII

Cubic did not appeal the Final Award, during the requisite period, with the competent courts in Switzerland.

XXXIII

On or about August 11, 1997, in a letter, MODSAF-IRI asked Cubic to comply with the Arbitration Award and pay all sums due. MODSAF-IRI also asked for the reimbursement of US$60,000.00 which MODSAF-IRI advanced to the ICC to pay for Cubic's 50% share of the arbitration fees. Cubic, however, failed to respond to said letter. [A certified copy of the letter is attached hereto, marked as Exhibit 4, and made a part hereof].

XXXIV

On or about December 2, 1997, MODSAF-IRI again wrote to Cubic and asked for its compliance with the award, as well as for the reimbursement of US$60,000.00 which MODSAF-IRI advanced to the

ICC to pay for Cubic's 50% share of the arbitration fees. Again, Cubic refused to answer to this letter. [A certified copy of the letter is attached hereto, marked as Exhibit 5, and made a part hereof].

Wherefore, Petitioner moves:

1. That an order confirming said award as against Respondent, Cubic, be made;
2. That a judgment be entered in conformity therewith;
3. That Petitioner be allowed all costs and attorneys fees incurred herein;
4. That Respondent reimburse Petitioner for the monies advanced in excess of Petitioner's share of arbitration costs, in the sum of US$60,000.00, plus accrued interest; and
5. That Petitioner be awarded such other and further relief as may be proper.

Dated: June 24, 1998

/s/ Mina Almassi
Mina Almassi, Esq.
Attorney for Petitioner,
the Ministry of Defense and
Support for the Armed Forces
of the Islamic Republic of Iran,
as Successor in Interest to the
Ministry of War of the
Government of Iran

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CIVIL DIVISION

The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, as Successor in Interest to the Ministry of War of the Government of Iran, Petitioner vs. Cubic Defense Systems, Inc., as Successor in Interest to Cubic International Sales Corporation, Respondent	TABLE OF EXHIBITS TO PETITION FOR ORDER CONFIRMING FOREIGN ARBITRAL AWARD [9 USCS §207]

Exhibit Number	DOCUMENT
1.	Sales Contract dated October 23, 1977 (28 pages)
2.	Service Contract dated October 23, 1977 (32 pages)
3.	Award Sentence issued May 5, 1997 (88 pages)

4. MODSAF-IRI's Letter to Cubic dated August 11, 1997 (1 page)

5. MODSAF-IRI's Letter to Cubic dated December 2, 1997 (1 page)

EXHIBIT 3

INTERNATIONAL COURT OF ARBITRATION

COUR INTERNATIONALE D'ARBITRAGE

CASE No. 7365/FMS

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN
(Iran)

v/

CUBIC INTERNATIONAL SALES CORPORATION

(U.S.A.)

This document is an original of the award rendered in conformity with the Rules of the ICC International Court of Arbitration.

*****

Ce document est un original de la sentence rendue conformément au Règlement de la Cour Internationale d'Arbitrage de la CCI.

* * *

ICC Arbitration

Case No. 7365/FMS

FINAL AWARD

in the Arbitration between

ISLAMIC REPUBLIC OF IRAN

acting through its

MINISTRY OF DEFENSE AND SUPPORT FOR ARMED FORCES
No. 1 Shahid Kaboli Street
Beginning of Resalat Highway
Seyyed Khandan Bridge
P.O. Box 16765-1479
Tehran, Iran

Claimant and Counterrespondent

and

CUBIC DEFENSE SYSTEMS INC.
9233 Balboa Avenue
San Diego, California 92138, USA

Respondent and Counterclaimant

represented by

ARENT FOX KINTNER PLOTKIN & KAHN
1675 Broadway
New York, New York 10019-5874, USA

* * *

1. THE PARTIES

1.1 The Claimant and Counterrespondent in this Arbitration is the *Islamic Republic of Iran* acting through its Ministry of Defense and

Support for the Armed Forces which entered in 1979 under its former name "Deputy Ministry of Armament" and as an organ of the Government of Iran and therefore as an organ of the Iranian State (known now as the Islamic Republic of Iran) into a contractual relationship with the other party to this Arbitration. The changes of names followed the Revolution of 1979 and important changes in the structure and organisation of the Government of Iran. This party shall hereinafter be referred to as "Iran" or as "Claimant".

1.2 The Respondent and Counterclaimant in this Arbitration is *Cubic Defense Systems, Inc.*, an U.S. corporation and a wholly-owned subsidiary of Cubic Corporation, also an U.S, corporation. Cubic Defense Systems, Inc., is the successor in interest to Cubic International Sales Corporation which initially entered into the above mentioned contractual relationship with Iran in 1977 and which has dissolved in the meantime. It shall hereinafter be referred to as "Cubic" or as "Respondent".

1.3 The parties to the contracts in dispute and to this Arbitration shall together hereinafter be referred to as the "Parties".

2. THE CONTRACTUAL BACKGROUND OF THE ARBITRATION

2.1 The dispute between the Parties arises out of two agreements dated October 23, 1977 (hereinafter "the Contracts"), one relating to the sale of the necessary subsystems and support

equipment that comprise an *Air Combat Manoeuvring Range* (hereinafter "ACMR" or "the System") for use by the Iranian Air Force (hereinafter "the Sales Contract"), the other relating to the installation and integration in Iran of the above military equipment (hereinafter "the Service Contract"). Amendments were made to the Contracts on August 7 and 8, 1978. The two Contracts were concluded by Iran as the customer on the one side and Cubic as the supplier on the other side.

2.2 The Sales Contract provided for progress payments upon completion of a specified portion of the work. By virtue of the Sales Contract, Cubic provided irrevocable standby letters of credit guaranteeing Cubic's performance and the return of the advance payment under certain conditions. Iran paid US$ 12,608,519. – of the sum due under the Sales Contract. Under the Service Contract, US$ 302,857. – was paid to Cubic. Under the Sales Contract, Iran was provisionally to accept and take delivery of the System at Cubic's plant in San Diego, California and subsequently transport the System to Iran.

2.3 In accordance with Contract Amendment no. 1 to the Sales Contract, dated August 8, 1978, the Parties agreed to change from a configuration that was to be in vans to a system configured for use in building to be supplied by Iran. Such building was to be complete and available for installation on September 1, 1979 (cf. Cubic's Defense and Counterclaim Exh. 29).

Subsequently, Iran was to transport the System to Iran.

2.4 Under the Service Contract, Cubic was to perform various site preparation tasks prior to formal acceptance in Iran and thereafter to perform installation, maintenance and training in connection with the System for a specified period of almost 3 years.

2.5 For reasons that are the subject matter of the present arbitration, performance of both the Sales Contract and the Service Contract was discontinued in or about 1979.

2.6 Both Contracts included similar *arbitration clauses*[1], which provide as follows:

"(a) General. Any controversy, dispute or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration in the City of Zurich, Switzerland, in accordance with the laws of the Government of Iran in effect as of the date of this contract.

(b) Notice. In the event the parties are unable to resolve any such dispute, controversy, or claim, either party may give written notice to the other of their intent to submit the matter to arbitration.

(c) Cost of arbitration. The cost of arbitration shall be paid by the losing party." (Sales Contract) / "The cost of arbitration shall be paid

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[1] Sales Contract, Article XII.15; Service Contract, Article XI.18

equally by CUBIC and the Government of Iran." (Service Contract)

* * *

7. THE LAW APPLICABLE TO THE MERITS

7.1 The identical choice of law clauses in the relevant Article XII.3 of the Sales Contract and Article XI.3 of the Service Contract read as follows:

"3. Applicable Law

This agreement shall be construed and performance thereof shall be determined in accordance with the laws of the Government of Iran in effect at the date of this contract."

The Parties' choice of law has been confirmed, in identical terms, in Sect. 5 of the Terms of Reference.

7.2 Claimant's initial understanding of the choice-of-law clause was such that all issues are *exclusively* governed by the laws of the Government of Iran in effect at the date of the Contracts (Terms of Reference, Sect. 3.3.3). Respondent in its first submission contended, however, that to resolve the dispute *"well-settled principles of international commercial law"* be applicable "notwithstanding the parties' choice of Iranian law in Article XII.15" (Answer and Counterclaim, p. 6). In its subsequent submission, Respondent described its first contention by stating "that general principles of international law, including the lex mercatoria and trade usages, should complement

and, as necessary, supplement the applicable Iranian law" (Defense and Counterclaim, p.29). And finally, in its Rebuttal Statement, Claimant also explicitly agreed to the complementary and supplementary application of general principles of international law emphasizing, however, that "there is no conflict between basic principles of Iranian law and general principles of international law" (Claimant's Rebuttal, p.11). Claimant further referred to Article 3 of the Iranian Civil Procedure Code which provides that cases must be decided in accordance, i.a., with established *trade usages* (in particular "where the existing laws of the country are not perfect") and to a similar provision in the ICC Rules (Article 13 Subsect. 5).

7.3 The Parties' choice of law is binding on the Arbitral Tribunal pursuant to well established principles of international law and to the law applicable in international arbitrations held in Switzerland (Art. 187 of the Swiss International Private Law Statute).

Since both Parties eventually agreed to the complementary and supplementary application of general principles of international law and trade usages, and based on Article 13(5) of the ICC Rules, the Tribunal shall, to the extent necessary, take into account such principles and usages as well. As to the contents of such rules, the Tribunal shall be guided by the *Principles of International Commercial Contracts*, published in 1994 by the Unidroit Institute, Rome (hereinafter referred to as "UNIDROIT Principles").

7.4 In all Articles of the Contracts pertaining to the applicable law the Parties refer to Iranian law *at a specific time*. Such stabilization or freezing clauses are well recognized and enforceable both under Swiss arbitration law and in

* * *

E. The Termination for Convenience Clause

11.23 The Contracts[8] explicitly provide for the right of Claimant to terminate, by written notice, the contract in whole or in part "when it is in the best interest of the Government". In such event, the contractor shall submit his termination claim, including a statement of expended funds. The amounts to be paid by Iran to Cubic by reason of termination under this clause " . . . may include a reasonable allowance for profit on work done."

11.24 It is doubtful whether this clause (hereinafter "Termination for Convenience Clause") directly applies to the instant case, Claimant clearly stated that it did not terminate the Contracts for its convenience (Reply pp. 9 and 10; Hearing II, Transcript pp. 152ss). Respondent's initial alternative allegation in this respect (Answer to the Request, p. 5) has been abandoned and withdrawn in the course of the proceedings (Hearing II, pp. 188ss; Respondent's Post-Hearing Brief II, p. 23).

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[8] Sales Contract, Article XII.12: Service Contract, Article XI.15

11.25 Under Article 13(5) of the ICC Rules, the arbitrator must take account, in all cases, of the *provisions of the contract* (and the relevant trade usages). It is a widely accepted principle that contractual obligations of the parties may be *implicit. Implied obligations* may stem from the nature and purpose of the contract, practices established between the parties and usages, good faith and fair dealing and reasonableness (UNIDROIT Principles, Articles 5.1 and 5.2).

11.26 Pursuant to such criteria as good faith and fair dealing, parties to a contact may reasonably expect that *similar situations* should have the same or similar consequences to the extent that the applicable law or the contractual terms do not explicitly provide otherwise. In the instant case, the factual circumstances are *extremely close* to, if not identical with, a termination of the Contracts by Iran for its convenience:

a) In the negotiations which ultimately led to the provisional discontinuance, it was mainly *Iran* which expressed the wish to terminate the Contracts, whereas Cubic would obviously have preferred that the project be continued (Sects. 9.5 and 9.8 supra), subject to the timely renewal of the export licence (Sects. 8.6 to 8.8 supra).

b) The change of circumstances that induced the Parties to discontinue the Contracts, i.e. the Islamic Revolution, occurred in Iran's, not in Cubic's area of risks.

c) Claimant's written statements in its letters of May 15 and June 10, 1979 (Sects. 9.8 and 9.10 supra) clearly express Iran's position that it was no longer interested in Cubic's delivery.

d) In its letters of May 20 and June 12, 1979, Cubic confirmed to have received Iran's declarations "that there is no need for the above system by the Air Force" (Defense and Counterclaim Exh. 71 and 74). In his May 20 letter, Cubic's representative explicitly based Cubic's claims for the contract balance on "paragraph 12 of Article 12, p. 11" of the Sales Contract (which paragraph is precisely the Termination for Convenience Clause). Thus, at the relevant time, Cubic understood Iran's statement that it did no longer need the ACMR as Iran's notice of termination under the Termination for Convenience Clause. Iran did not object, at that time, to Cubic's understanding.

e) Furthermore, at an early stage of the present arbitration proceeding, Cubic – when describing one of its alternative positions – expressed the view that the Iranian Air Force's letter of May 15, 1979 (Sect. 9.8 supra) constituted a termination under the Termination for Convenience Clause (Answer and Counterclaim p. 5).

11.27 Except for the absence of an explicit reference, by Iran, to the Termination for Convenience Clause or to a similar language close to the

wording of that contractual provision, all requirements of a contract termination under the Termination for Convenience Clause are met. It would be excessively formalistic, and contrary to the principles of good faith, fair dealing and reasonableness if Iran's entitlement to a reimbursement of the advance payments and Cubic's entitlement to further payments would be governed, in the instant case, by different legal or contractual provisions than in the event Iran had formally invoked the contract clause entitling it to terminate the Contracts for its convenience. Accordingly, the Tribunal concludes that the Termination for Convenience Clause shall be applied, if not directly, then at least by analogy, to the assessment of the Parties' respective claims.

11.28 Depending on the result of the attempt to resell the System, either Claimant became entitled to be (partly) reimbursed for the payments it had made to Cubic, or Cubic became entitled to claim, in balance, an additional payment from Iran. Prior to the review of any such claims, certain preliminary defenses raised by the Parties must be examined.

* * *

15. THE SALVAGE VALUE OF THE SYSTEM MANUFACTURED FOR CLAIMANT

* * *

B. Cubic's Resale Efforts

15.5 The Tribunal first deals with Cubic's contention that despite its resale efforts it was not

able to resell the System as it existed in 1979 to another purchaser and that it had to be satisfied by reusing *parts of the equipment* only in the context of an ACMR sale to Canada and to a few other purchasers. Reference will also have to be made to Iran's contention that Cubic's gross sales proceeds were or should have been higher.

15.6 As from August 1979, Cubic tried to resell the System to various states (U.S. Navy, Taiwan, Pakistan, Egypt and Canada) (cf. Mather, Hearing II, Transcript pp. 374, 380). Finally, Cubic was able to reuse important parts thereof in its sale to Canada and other components were sold to various agencies of the U.S. Government. Iran does not specify which other states than those contacted by Cubic could have been interested in buying the System and in buying it at a higher price, or with less modification costs or with a more important part of reused material.

15.7 It was in Cubic's own interest to resell and/or reuse the equipment manufactured for Iran with the best possible result since Cubic did not intend to account for its resale or reuse proceeds to Iran. Accordingly, credit must be given to Cubic's contention that the reuse of the equipment in the sale of an ACMR to Canada was the first and most advantageous "resale" opportunity and that it reused parts of the equipment manufactured for Iran to the best possible extent and with the least possible costs.

* * *

18. SUMMARY OF THE PARTIES' TERMINATION ACCOUNTS

18.1 Under the *Sales Contract*, credit has to be given to Iran for its advance payments of

USD 12,608,519. –

On the other hand, Cubic is entitled to a compensation calculated on the basis of the following elements:

a) Expended Funds
(Sect. 14) USD 10,500,000. –

b) less Salvage Value
(Sect. 15) ./. USD 4,200,000. –

c) plus Allowance for Profits
(Sect. 16) USD 3,500,000. –

./. USD 9,800,000. –

Accordingly, Iran is entitled
in balance to an amount of USD 2,808,519. –

18.2 No additional claims have been awarded under the *Service Contract* (Sect. 17).

18.3 The Tribunal concludes *in summary*

a) that Iran's claim is well founded to the extent of USD 2,808,519. – ,

b) that Cubic's Counterclaim must be dismissed.

19. INTEREST

19.1 Iran requests to be awarded interest at the rate of 12% "as from the date of mutual termination or, at least, as from the time MOD filed a case before Iran-U.S. Claims Tribunal on 19 January 1982" (Claimant's Comments on Quantification, p. 63).

19.2 In the context of its Counterclaim, Cubic requested to be awarded – should the Termination for Convenience Clause be applied by analogy – simple interest at the rate of 12% per annum since June 20, 1979, a date to which Cubic referred as "the date of the last meeting held in Iran before Mr Nomai returned to the United States" (Post-Hearing Brief II pp. 23-25). Similarly, in its Statement of Quantification (Report of MDC, p. 10), Cubic stated to be entitled to interest from March 22, 1979 and September 9, 1979 for Milestones 3 and 4 payments, respectively.

19.3 In accordance with the contractual stabilization clause (Sect. 7.4), the applicability of prerevolution Iranian law to the question of interest has not been disputed by either Party.

19.4 Article 719 CPC has a fixed *statutory rate of 12% per annum* for the award of interest. This rate has not been disputed by the Parties, Both Parties have applied this rate in their calculations of and requests for interest (Claimant's Post-Hearing Brief II, p. 22; Respondent's Post-Hearing Brief II, pp. 23, 25). Furthermore, there exists a settled practice in Iranian law that the rate of 12% applies also to foreign

currencies (Decision no. 90-4-10-53 of the full panel of the Iranian Supreme Court, reprinted in Collection of the Laws of the Year 1353, section on judicial decisions of the full panel, pp. 28-29),

19.5 With respect to the relevant date from which the interest is to be awarded, the Tribunal takes into account the following points:

a) Pursuant to Article 720 CPC, the Parties may agree "on the beginning of the period for damages for interest". In the instant case, both Parties applied a similar approach as to the date from which interest should run in the sense that they both referred to the earliest dates on which their respective claims may have come into being. However, such approach does not amount to an (implicit) agreement in the sense of Article 720 CPC since each Party referred to the starting date of interest calculation exclusively in the context of its own claim without accepting this approach also with respect to the opponent's claim or more generally with regard to both Parties' claims resulting from the termination account. Neither of the Parties contended that they implicitly agreed on the maturity date as starting point in the 1979 negotiations. Equally, in the submissions presented in this Arbitration, the Parties did not consistently and unequivocally refer to the maturity date as the date from which interest should be awarded. Thus, the Parties' statements made in the course of the

proceedings do not amount to an agreement under Article 720 CPC either.

b) Accordingly, the applicability of Article 721 CPC which reads:

"In cases where there has been no arrangement in respect of damages for interest, if the relief is demanded by legal notice the damage for interest shall be calculated as from the date of service thereof otherwise it shall be calculated as from the date of instituting the suit."

must be discussed.

c) When Iran referred to the date of the claim it had filed against Cubic before the Iran-U.S. Claims Tribunal on January 19, 1982, it did so implicitly as the date of its "legal notice" under Article 721 CPC. The rationale of the legal notice requirement under Article 721 CPC is to clearly place a debtor in default by a notice having the additional weight of being served by an authority. Apart from the fact that Iran, in its filing of January 19, 1982, primarily sought specific performance of the Sales Contract (see "Relief Sought", Statement of Claim Exh. 11) rather than restitution of its advance payments, a notice of default may not validly be given prior to the date on which the claim matured. In 1979, the Parties had agreed to postpone the maturity date until the resale of the equipment was made or until such date when it became clear that no resale would occur (Sects. 12.10 to 12.15

supra). Cubic's resale and reuse activities substantially ended in October 1982. Accordingly, the Tribunal concluded that the Parties' termination claims matured in October 1982 (Sect. 12.14 supra). Thus Iran's filing of a claim on January 19, 1982 was *premature* and could not serve as a legal notice under Article 721 CPC.

d) The file does not contain any legal notice (in the sense of Article 721 CPC) subsequent to Claimant's premature filing of January 19, 1982. Iran's second memorandum filed in the proceedings before the Iran U.S. Claims Tribunal (Claimant's "Response to Respondent II of September 26, 1983, see Exh. C to Cubic's Comments on Quantification) does not place Cubic in default with respect to Iran's Restitution Claim since Iran confined its allegations, at this stage, to the theory that the Contracts were not terminated and should be performed by Cubic's delivery of the AMCR (Sect. 10.8 supra), Equally, the letters addressed by Iran or on behalf of Iran to Cubic in the course of 1988 to 1990 (Claimant's Rebuttal Exh. 51 to 55) were mere invitations to negotiate; they do not qualify as legal notices under Article 721 CPC either.

e) There is a tendency in international commercial law to award interest from the time when payment has become due without any need for the aggrieved party to give notice of the default (UNIDROIT

Principles, Article 7.4.9). However, although such rule has been included in the UNIDROIT Principles, it seems doubtful whether it may be considered to form part of *generally accepted principles* of international law. E.g., while the Iran-U.S. Claims Tribunal normally awarded interest from the date the debt was due, in a few cases interest was awarded, by the same Tribunal, only from the time it was first demanded or even from the date the claim was filed with the Tribunal (Aldrich, op.cit., p. 478s), furthermore, even if a generally accepted principle of international law existed in this respect, the Tribunal would only be authorized to apply it as a *complementary and supplementary rule*, not as a rule in clear contradiction to an unambiguous provision of the Iranian law chosen by the Parties (Sect. 7.3 supra).

f) Accordingly, interest may only be awarded "as from the date of instituting the suit" (Article 721 CPC), i.e. as from the date (September 24, 1991) when Iran filed its Request for Arbitration in the present proceeding. The Arbitral Tribunal does not overlook that Cubic – under the strict application of Article 721 CPC – solely benefits from funds which Iran would have been entitled to receive already in 1982. This aspect has been taken into account, to the extent appropriate, in the assessment of Cubic's allowance for profit (Sect. 16.1 subparagraph h).

19.6 Iran requested to be awarded interest "to the date of award in this proceeding" (cf. Sect. 3.3.1 of the Terms of Reference).

19.7 The Arbitral Tribunal concludes that Cubic shall pay interest at the rate of 12% per annum on USD 2,808,519. – as from September 24, 1991 until the date of this final Award.

* * *

21. FINAL AWARD (DISPOSITIVE PART)

For the reasons set forth above, the Arbitral Tribunal, deciding in accordance with the provisions of the ICC Rules of Conciliation and Arbitration, renders the following Final Award:

1. Cubic Defense System, Inc. ("Defendant") shall pay the Islamic Republic of Iran ("Claimant") the amount of U.S. Dollars 2,808,519. – together with (simple) interest on such amount at the rate of 12% per annum as from September 24, 1991 until the date of this Final Award.

2. Claimant's further claims as well as Defendant's counterclaim are dismissed.

3. The costs of this arbitration fixed by the ICC International Court of Arbitration at USD 490,000. – shall be equally borne by both Parties, i.e. in the amount of USD 245,000. – by each Party. Accordingly, Defendant shall reimburse Claimant the amount of USD 60,000. – advanced by Claimant in excess of its 50% share in the Parties' cost deposits.

4. Each party shall bear its own legal costs.

Done this 5th of May 1997

/s/ Seyed-Jamal
Prof. Seyed-Jamal SEIFI
Co-arbitrator
Dissenting

/s/ Werner Wenger
Dr. Werner WENGER
Chairman

/s/ Richard M. Mosk
Richard M. MOSK
Co-arbitrator
Dissenting

FOR PUBLICATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, as Successor in Interest to the Ministry of War of the Government of Iran, **Petitioner,** **v.** **CUBIC DEFENSE SYSTEMS, INC., as Successor in Interest to Cubic International Sales Corporation,** **Respondent.**	**CIV. CASE NO. 98-1165-B** **ORDER GRANTING PETITION TO CONFIRM FOREIGN ARBITRAL AWARD AND DENYING CROSS-MOTION TO VACATE THE MAY 5, 1997 ICC ARBITRATION AWARD** (Filed Dec. 8, 1998)

Petitioner, the Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran ("Iran"), filed a petition on June 25, 1998 for an Order Confirming a Foreign Arbitral Award against Respondent, Cubic Defense Systems, Inc. ("Cubic"). Cubic filed a cross-motion on October 9, 1998 to Vacate the May 5, 1997 Court of Arbitration of the International Chamber of Commerce ("ICC") Award ("Award"). Cubic contends that the ICC Award exceeds the scope of the terms of the submission to arbitration and ignores the terms of the Parties'

Contracts. Cubic also claims that it was not given a meaningful opportunity to present its case. The issue before this Court is whether Cubic's claims preclude this Court from confirming the ICC Award.

I. FACTUAL AND PROCEDURAL BACKGROUND

A brief review of the events leading up to this dispute is in order. On October 23, 1977, the Parties entered into two written contracts for the sale ("Sales Contract") and service ("Service Contract") of an Air Combat Maneuvering Range for use by the Iranian Air Force. The Contracts provided for progress payments upon completion of specified portions of work, pursuant to which Iran paid Cubic $12,608,519 under the Sales Contract and $302,857 under the Service Contract as of October 4, 1978.

In late 1978 and early 1979, political unrest and revolution developed in Iran, resulting in the Shah's departure from Iran and the return from exile of Ayatollah Ruhollah Khomeini.[1] Iran alleges that Cubic breached both Contracts by removing its service specialists from Iran and by failing to deliver the military system and equipment. Cubic alleges that in February and March of 1979, Cubic sent Iran notices of completion of Milestone 3 of the Sales Contract and

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[1] For a complete account of the political unrest in Iran during this period, *see Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1358-60 (9th Cir. 1989).

demanded payment of $5,403,651. According to Cubic, Iran did not respond to these notices, accept delivery, or make payment. Furthermore, Iran claims that after the Iranian Revolution in 1979, Cubic sold the goods to a third party, retained the sale proceeds, and failed to notify Iran of the sale. Cubic, however, alleges that it notified Iran of the possibility of resale on August 3, 1979.

On January 19, 1982, Iran filed a claim against Cubic with the Iran-United States Claims Tribunal at the Hague. On April 28, 1987, the Iran-U.S. Claims Tribunal issued an Order stating that it lacked jurisdiction to hear the matter.

Pursuant to the Sales and Service Contracts, Iran filed a Request for Arbitration before the ICC on September 24, 1991. Article 15 of the Sales Contract and Article 18 of the Service Contract both state that "[a]ny controversy, dispute or claim arising out of or relating to [these contracts] or breach thereof shall be settled by arbitration in the City of Zurich, Switzerland, in accordance with the laws of the Government of Iran in effect as of the date of [these contracts]." Iran and Cubic appointed their respective Arbitrators in 1992, and the ICC appointed a Panel Chair on May 6, 1993. On July 14, 1993 the Parties attended a prehearing conference at which the Terms of Reference for the Arbitration were decided.

On August 11, 1993, the ICC ordered bifurcation of the dispute, deferring the issue of quantification of the claim and counterclaim. Thus, on June 13-15,

1994, a hearing was held on all issues except for the quantification pursuant to the August 11, 1993 Order. On April 6, 1995, the ICC Tribunal issued an Order finding that Iran's claim for reimbursement and Cubic's counterclaim were not time-barred by the Iranian statute of limitations and that the bifurcation of the proceedings was no longer applicable.

Another hearing was held on November 7-9, 1995. On December 1, 1995 the ICC ordered further briefing by the Parties. On May 5, 1997, the ICC issued its Final Award:

> Cubic Defense System[s], Inc. . . . shall pay the Islamic Republic of Iran . . . the amount of U.S. Dollars 2,808,519. –, together with (simple) interest on such amount at the rate of 12% per annum as from September 24, 1991 until the date of this Final Award.
>
> . . . .
>
> [Cubic] shall reimburse [Iran] the amount of USD 60,000. – advanced by [Iran] in excess of its 50% share in the Parties' cost deposits.

(Award § 21). The ruling was issued by the Panel Chair, with dissents from both Arbitrators. In sum, one Arbitrator dissents on the ground that Iran is entitled to more relief than awarded and the other Arbitrator dissents in judgment finding for Cubic. Iran filed its petition for an order confirming this Award on June 25, 1998. Cubic cross-motioned for an order vacating this Award on October 9, 1998.

II. DISCUSSION

A. Standard of Law

The Court is asked to confirm the ICC Award pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("Convention"), opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *reprinted in* 9 U.S.C. §§ 201-208. The United States became a party to the Convention in 1970, and Congress soon after enacted legislation implementing the provisions of the Convention into domestic law, codified as Chapter II of the Federal Arbitration Act ("FAA"), Pub. L. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. § 201-208). A district court's "review of a foreign arbitration award is quite circumscribed." *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992). There is a general pro-enforcement bias under the Convention. *See Id.*; *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 & n.15 (1974). Upon application for an order confirming the award, the "district court has little discretion: 'The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.'" *Ministry of Defense*, 969 F.2d at 770 (citing 9 U.S.C. § 207).

The grounds for refusing to recognize or enforce an arbitral award include:

> (a) The parties to the agreement . . . were, under the law applicable to them, under

> some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present [his or her] case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced;. . . .[2]

Convention, art. V(1). In particular, courts should narrowly construe Article V(1)(c) in accordance with the Convention's general pro-enforcement bias. *See Ministry of Defense*, 969 F.2d at 770.

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[2] Article V(1)(d)-(e) and Article V(2) of the Convention also set forth grounds upon which a court may refuse to recognize or enforce a foreign arbitral award. Cubic, however, does not make claims pursuant to these provisions of the Convention and therefore these grounds are not before this Court.

Section 10 of the FAA and case law addressing domestic arbitration set forth grounds upon which a court may refuse to confirm an arbitration award. These grounds, however, are not applicable to confirmation under the Convention. The statute implementing the Convention states that a "court shall confirm the award unless it finds one of the grounds for refusal . . . specified in the said Convention." 9 U.S.C. § 207. Thus, other provisions regarding arbitration are not applicable to petitions requesting confirmation of an arbitration award under the Convention. *See Ministry of Defense*, 969 F.2d at 770 (limiting discretion of district court to grounds for refusal specified in the Convention); *Management & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1533-34 (9th Cir. 1987) ("Under the Convention, an arbiter's award can be vacated only on the grounds specified in the Convention."); *see also Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998) (finding that "the Convention's enumeration of defenses is exclusive"); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" US, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997) ("[T]he grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award."); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 (6th Cir. 1996) ("Article V of the Convention lists the exclusive grounds justifying refusal to recognize an arbitral award.").

B. Cubic's Opposition to Confirmation of the Arbitration Award

1. Article V(1)(c)

Cubic first contends that the ICC Award violates Article V(1)(c) of the Convention because it "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration" and it "contains decisions on matters beyond the scope of the submission to arbitration."[3] Cubic also alleges that the award violates Article V(1)(c) because it ignores the terms of the Parties' Contracts. Thus, Cubic argues that the "Terms of Reference constitute the jurisdictional mandate of an arbitral panel, and any decision which exceeds the scope of that jurisdictional reference is improper."

Specifically, Cubic argues that the Tribunal decided issues not submitted by the Parties and issued a ruling based upon legal theories not contemplated by and/or asserted by the Parties. The legal theories and conclusions Cubic takes issue with are: (1) the "conclusion that the Parties agreed in 1979 to discontinue the Contracts at least for the time being, i.e., until the results of Cubic's attempt to resell the System would be known" (Award § 10.11); (2) the conclusion that there was "an implicit agreement for the postponement of the maturity date of any such

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[3] Cubic also contends that the Award violates 9 U.S.C. § 10 of the FAA. As explained by this Court, § 10 of the FAA does not apply to claims brought under the Convention.

claims until Cubic had resold the equipment or declared its inability to resell" (Procedural Order No. 6 § 1.3); (3) the conclusion that there was "a factual termination of the Contracts at the request of Iran" (Award § 11.22); and, (4) the finding that it can be implied from the Termination for Convenience Clause that "Cubic shall credit Iran with . . . products manufactured for Iran prior to the termination of the Contracts." (Award § 13.6).

Cubic's objections are misguided. First, the Terms of Reference allow the Arbitrators leeway in resolving the conflict that the Parties presented to them. Cubic cites specific questions framed by the Terms of Reference and claims that the ICC Award's deviations from those particular questions constitutes a deviation from the Terms. However, as Iran points out, the questions posed for the Arbitrators were presented in the following manner in the Terms of Reference:

> The issues to be determined shall be those resulting from the Parties' submissions and which are relevant to the adjudication of the Parties' respective claims and defenses. In particular, *the Arbitral Tribunal may have to consider the following issues (but not necessarily all of these or only these*, and not necessarily in the following order). . . .

(Terms of Reference § 4) (emphasis added). The Terms of Reference then proceed to list twelve issues that *may* be considered in the adjudication of the Parties' claims and defenses. The Arbitrators were

not, however, explicitly required to consider all of these issues in resolving this contractual dispute. The Arbitrators were also not limited to the issues listed, but could consider additional issues in resolving this dispute. Furthermore, the Award is within the parameters of those twelve issues, even if the legal theories applied are different from those presented in the Parties' pleadings. Thus, based only on an evaluation of the Terms of Reference, the use of legal theories not presented by the Parties is acceptable under the Terms of Reference.

Second, Cubic's claim that the use of legal theories not presented by the Parties precludes confirmation of the Award was rejected by the Ninth Circuit. *See Ministry of Defense*, 969 F.2d at 771. Under the Convention, a court is to determine "whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of the parties' pleadings." *Id.* Respondents in *Ministry of Defense* objected to confirmation of that award "because the award [was] not based on the same legal theory as that stated in the pleadings." The court found that the subject matter of respondent's claim was "obvious[ly]" the contracts between the parties and to the extent the "award resolves the claims and counterclaims connected with the two contracts it . . . does not exceed the scope of the submission to arbitration." *Id.* Comparing *Ministry of Defense* to this case, the Court finds that the subject matter of this dispute is the Service and Sales Contacts between Cubic and Iran. The ICC Award resolves the Parties'

claims arising from these Contracts and the fact that the Award is not based on the same legal theories as stated in the pleadings cannot be a basis for refusing to confirm it.

Cubic also disputes the Tribunal's reference to the Principles of International Commercial Contracts published in 1994 by the Unidroit Institute ("UNIDROIT Principles") and the Tribunal's references to principles of fairness such as good faith and fair dealing. Cubic claims that reference to such international and equitable principles also violates Article V(1)(c) because this law exceeds the scope of the Terms of Reference. The reference to the UNIDROIT Principles does not exceed the scope of the Terms of Reference. One of the issues presented to the Tribunal was whether general principles of international law apply to this dispute. That Cubic disagrees with the Tribunal's response to the question posed by the Parties is not a reason to find that the Tribunal addressed issues beyond the scope of the Terms of Reference. The same is true for Cubic's assertions with regard to the Tribunal's references to equitable principles of contract law.[4]

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[4] Cubic relies on *Beacon Journal Publ'g v. Akron Newspaper Guild*, 114 F.3d 596, 600 (6th Cir. 1997), for its contention that arbitration awards based on fairness and equity instead of the terms of the agreement should be overturned. Even if this case were binding on this Court, the case resolves a domestic arbitration dispute arising from a collective bargaining agreement and is therefore not applicable to the confirmation of arbitral awards

(Continued on following page)

As stated earlier, this Court's discretion in reviewing a foreign arbitration award is quite circumscribed. *See Ministry of Defense*, 969 F.2d at 770. The Tribunal's reference to and application of the UNIDROIT Principles and principles such as good faith and fair dealing do not violate Article V(1)(c). The Tribunal applied these principles to differences contemplated by and falling within the terms of the submission to arbitration and therefore the Award does not violate Article V(1)(c).

2. Article V(1)(a)

Article V(1)(a) provides that a court may refuse to confirm an arbitral award if an agreement in writing, including an arbitral clause in a contract or an arbitration agreement, is not valid under the law to which the parties have subjected it. Cubic appears to be arguing that the four theories of the Tribunal that Cubic contests constitute oral amendments to the Contracts' arbitration clauses and the Terms of Reference. Cubic contends that these oral amendments violate the Convention's requirement that the agreements be in writing. Cubic's construction of the Award and the Convention is strained.

The arbitration clause in the Contracts and the Terms of Reference validly present the Tribunal with the task of resolving the dispute over the Contracts

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under the Convention. *See Ministry of Defense*, 969 F.2d at 770; *see also M & C Corp.*, 87 F.3d at 851 (6th Cir. 1996).

between Iran and Cubic resulting from the unusual circumstances surrounding the 1979 Iranian Revolution. This Court cannot refuse to confirm the Award simply because the legal theories and conclusions presented in the Award differ from those contemplated by the Parties in their pleadings. Legal theories used by adjudicators to resolve contract disputes are not considered oral amendments to the contract or the arbitration agreement. Article V(1)(a) of the Convention does not present this Court with grounds for refusing to confirm the Award.

3. Article V(1)(b)

Article V(1)(b) allows a court to refuse confirmation of an arbitral award if the "party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [his or her] case." Cubic contends that it was "denied a meaningful opportunity to present its case" because: (1) Iran shifted its factual and legal theories throughout the proceedings; (2) the Tribunal issued interim decisions regarding bifurcation of the proceedings; and (3) the legal theories and remedies articulated in the Award were not previously presented. Even if these allegations were true, these claims do not rise to the level required by Article V(1)(b) to justify a refusal by this Court to confirm the Award. Cubic's active participation in the entire process demonstrates notification of the proceedings, therefore Cubic presumably relies on the latter part of Article

V(1)(b) to justify its claim. However, Cubic was also "otherwise able to present [its] case." Two hearings were held. Cubic also had several opportunities for briefing. Cubic had its "day in court" and had ample opportunity to present its interpretation of the facts and its legal theories to the Tribunal. Therefore, the Award does not violate Article V(1)(b).

III. CONCLUSION

The Court hereby GRANTS Iran's Petition for Confirmation of the Foreign Arbitral Award and, subsequently, the Court hereby DENIES Cubic's Cross-Motion to Vacate the May 5, 1997 ICC Arbitration Award.

IT IS SO ORDERED.

DATED: 12-7-98

/s/ _____
UNITED STATES SENIOR
DISTRICT JUDGE

cc: All Parties
Magistrate Judge

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF THE STATE OF CALIFORNIA

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, Petitioner, v. CUBIC DEFENSE SYSTEMS, INC., Respondent.	Case No: 98CV1165-RMB Southern California (San Diego) **DECLARATION OF MINA ALMASSI IN SUPPORT OF PETITIONER'S MOTIONS FOR JUDICIAL DETERMINATION THAT ITS JUDGMENT AGAINST CUBIC DEFENSE SYSTEMS IS IMMUNE FROM ATTACHMENT OR EXECUTION BY STEPHEN M. FLATOW AND DARIUSH ELAHI**

Date: October 15, 2002
Time: 10:30 a.m.
Dept: 2
Judge: The Hon.
Rudi M. Brewster

(Filed Sep. 13, 2002)

I, MINA ALMASSI, declare as follows:

1. I am an attorney licensed to practice before all of the state and district courts of the State of California and am one of the attorneys of record for Petitioner, THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN ("MOD"), herein. The following is based upon my personal knowledge. If called upon to testify, I could and would testify competently thereto.

2. On June 5, 2001, MOD moved to dismiss Stephen M. Flatow's ("Flatow") appeal to the Ninth Circuit Court of Appeals on the grounds that Flatow had received his compensatory damages from the United States government and in exchange therefore he had relinquished his right to proceed against the asset at issue in this case.

3. Oral argument was heard on December 6, 2001.

4. Subsequently, on December 17, 2001, the Court of Appeals entered an Order staying the appeal for 45 days or until such time as the district court decides this motion, whichever is sooner.

5. Shortly thereafter, pursuant to the instructions of the Court of Appeal, MOD filed a Motion to Expunge Stephen Flatow's Judgment Lien in this Court. Said Motion was dismissed without prejudice at the request of MOD so that MOD could refile its motion and properly seek a judicial determination that its Judgment against Cubic is immune from attachment or execution.

6. Attached hereto as Exhibit "1" is a true and correct copy of the Partial Award entered in Case No. A/15 pending before the Iran-United States Claims Tribunal in The Hague, The Netherlands.

7. Attached hereto as Exhibit "2" is a true and correct copy of Statement No. 16 addressing the value of the assets at issue, which were the subject of the complaint in Case No. B/61 pending before the Iran-United States Claims Tribunal in The Hague, The Netherlands.

8. Attached hereto as Exhibit "3" is a true and correct copy of the relevant pages of the House Report, No. 94-1487 (1976) U.S. Code congressional and Administrative News.

9. Attached hereto as Exhibit "4" is a true and correct copy of information published by the United States Space and Naval Warfare and Systems Command on its website and referenced in MOD's moving papers; Available at http://fms.spawar.navy.mil/054/faq.html.

10. Attached hereto as Exhibit "5" is a true and correct copy of the relevant pages of the research report written by Beard, Michael N., Lt.Col USAF, *United States Foreign Military Sales*

Strategy: Coalition Building or Protecting the Defense Industrial Base 1995 Air War College, Air University, Maxwell Air Force Base, Alabama; Available at http://papers.maxwell.af.mil/projects/ay1995/awc/beardmn.pdf.

11. Attached hereto as Exhibit "6" is a true and correct copy of the *Defense Security Cooperation Agency (Facts Book) – Foreign Military Sales, Foreign Military Construction Sales and Military Assistance Facts.* (September 30, 2000); Available at http//web1.deskbook.osd.mil/reflib/DDOD/001EN/001ENDOC.HTM.

12. Attached hereto as Exhibit "7" is a true and correct copy of the relevant pages of a recent article in ATLANTIC MONTHLY James Fallows entitled *Uncle Sam Buys an Airplane,* June 2002, ATLANTIC MONTHLY 62,63.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed at San Jose, California on this 11th day September, 2002.

/s/ Mini Almassi
MINA ALMASSI

EXHIBIT 2

STATEMENT NO. 16

CUBIC ITEMS

I.

IRANIAN PROPERTY AND ITS VALUE

1. The items at issue are sophisticated defence equipment called Air Combat Maneuvering Range ("ACMR"), an electronic air combat training system. This equipment, produced under the Contract entered into with the Company on 3 October 1977 has been identified in the Contract submitted in Iran's Consolidated Submission, Exhibit 16 (Doc. 204). *See* Doc. 236, CUBIC at 1.

2. As acknowledged by Cubic:

   "The ACMR equipment was fully manufactured and ready for shipment to Iran in February 1979." Doc. 236, Cubic, Attachment 4 at 2.

   The items continued to remain on the U.S. soil through 19 January 1981 until CUBIC sold them, upon making some modifications, to the Canadian Government pursuant to a contract dated 16 September 1981. *Id.*

3. The market price of the equipment, constituting Iran's remedy in the main, is the same amount at which the items were sold to the Canadian Government on 16 September 1981. This price, the Total Firm Price Items under Article 7 of the Cubic-Canadian Government Contract, is U.S. $17,139,046.50. *See* the excerpts at Attachment No. 1. To this amount is also to be added, at the

very least, the Contract price of: i) 4 generators, items identified as 0005AA and 0005AB in the original Contract, in the amount of U.S. $544,654.00 and ii) 4 Airborne Instrumentation sub-system (AIS), item No.0006, in the amount of U.S. $717,308.00.[1] The total relief is, thus, U.S. $18,401,008.50.

II.

U.S. DEFENCES

A. *Common defences already discussed in Iran's Reply (Volume I)*

1) "Iran assumed the risk of non-export of the Items". Doc. 236. Cubic, at 3, note 3. *See* Iran's Reply at 2.1.2, 2.1.4 and 2.2.

B. *Special defenses raised here*

1. *U.S. Argument:*

"Iran has submitted no evidence to prove that it is entitled to such compensation. All Iran has submitted in support of its claim

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[1] The specified i) and ii) items do not appear among the system sold to Canada. There is no mention of the sale of the 4 generators, procured under the original Iran-Cubic Contract in the Cubic-Canada Agreement; the number of the AIS sold to Canada is 16 leaving a balance of 4, out of the 20 AIS produced under the original Iran-Cubic Contract, which continued to remain in the Cubic's possession. *See* Attachment NO. 1 at 7 and Attachment No. 6.

with respect to Cubic is a copy of the Contract listing the items". Doc. 236 at 2.

Iran's Answer:

The evidence, relied on in this Statement partly produced by the United States itself, in any event, clearly establishes the existence of the items at issue on the U.S. soil as of 19 January 1981 as well as their 1981 market price.

2. *U.S. Argument:*

"In the interest of consistency, efficiency and equity, the Tribunal should await the decision of the ICC in the pending arbitration before proceeding with respect to Iran's claim here. The United States requests that once the ICC renders its decision, Iran and the United States be provided an opportunity to exchange further pleadings." *Id.* at 3.

Iran's Answer:

The ICC proceeding, which has anyway terminated[2], cannot have a *res judicata* impact

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[2] *Islamic Republic of Iran* v. *Cubic Defence Systems Inc.* Case No. 7365/FMC ICC FINAL AWARD (5 May 1997), (ICC Award). *See* excerpts at Attachment No. 2. The ICC legal conclusions are totally alien to Iranian law, on which ICC has purportedly based them. The ICC has neither accepted Iran's argument of *Eqhaleh* (Articles 283-288, Iran's Civil Code), according to which the parties' position prior to the execution of the contract has to be fully restored. Nor does ICC follow the legal consequence of its factual finding that the parties mutually agreed that Cubic would try to sell the items and receive instead the

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on the present Case. This is because that case and the present one lack three identities (identity of object, identity of parties, and identity of subject matter) required for that purpose. The object of this litigation, unlike that in ICC lawsuit, is the United States' obligation under the Algiers Declarations to arrange for the transfer of the items to Iran. The opposing party in this Case is, obviously not a U.S. private company, but the United States' Government. The subject-matter of this Case, at variance with the ICC action, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties. The absence of any single one of those three requisites would deny a judgment *res judicata* effect. *See, e.g., A Treatise on the Law of Rest Judicata by Hulcan Chaud* published by William Clowes & Sons, London,

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cost of any necessary modifications plus a brokerage fee. This fact-situation is clearly governed by Articles 292 and 293 of Iran's Civil Code (NOVATION). The ICC, however, chose to found its legal conclusion, without any legal justification, on half of the established truth (the parties' agreement to terminate the old Contract) not on the other (the parties' agreement that Cubic pays Iran the sales proceeds net of modification costs and brokerage fees). The ICC's so-called settling the parties' account, resulting in an award of the reimbursement of a minor portion (U.S.$2,808,519) of the total payments made by Iran (USD12,608,519), has no basis whatsoever in Iranian law to which ICC pays lip service as the applicable law. *Id.* para. 18.1; and the discussions in this Statement. To be said, Cubic has not, thus far, paid Iran the awarded sum of U.S.$2,808,519, nor is there any prospect of such payment. This amount, if received, will be recuperated from the remedy sought.

1894. For a very recent publication, *see African Journal of International* March 1996 8, p. 38 *et seq*, *Res Judicata and the Rule of Law in International Arbitration*, Vaughan Louse.

3. *U.S. Argument:*

"Iran did not have any ownership interest in the items as of January 19, 1981, and they were therefore not the subject of any obligation of the United States under the Algiers Accords." *Id.* at 3, note 3.

Iran's Answer:

This is string the United States harps on indiscriminately in all cases without rhyme or reason. The United States does not make a single argument, either legally or factually, in support of this bare assertion. The law and fact in the present Case, for the reasons to be stated, fully support Iran's ownership of the equipment.

i) Iran's Ownership Over the Items Is Established by Applicable Iranian Law

First and foremost, the applicable law is Iranian law under which any item produced under the Contract automatically becomes Iranian property[3]. The Contract provides that:

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[3] *See* Iran's Reply (Volume I) at 3.1.1.4.3.

> "This agreement shall be construed and performance thereof shall be determined in accordance with the laws of the Government of Iran in effect at the date of this Contract.". Doc. 236, Cubic, Attachment 1, PAGE NO EIGHT, 3. Applicable Law.

This clause is no doubt determinative of the issue of ownership. As stated in the ICC Award:

> "The Parties choice of law is binding on the Arbitral Tribunal pursuant to well established principles of international law . . . " Attachment 2, para 7.3.

No rule of law can, of course, override the application of Iranian law. As held by ICC:

> "[E]ven if a generally accepted principle of international law existed in this respect,[4] the Tribunal would only be authorized to apply it as a *complementary and supplementary rule* [emphasis in original], not as a rule in clear contradiction to an unambiguous provision of the Iranian law chosen by the Parties (Sec. 7.3 supra). *Id.* at para. 19.5 (e).

Iran's understanding of the choice-of-law clause, as held in the ICC Award, was such that:

> "[A]ll issues are *exclusively* [emphasis in original] by the laws of the Government of

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[4] The issue referred to is "interest". However, it is clear that the Tribunal refers to this aspect for being a contentious issue in explanation of a settled rule of international law.

Iran in effect at the date of the Contracts (Terms of Reference, Sec. 3.3.3). *Id.* at para. 7.2.

ii) Factual History Corroborates Iran's Ownership

The factual background too fully confirms Iran's ownership of the items as follows:

a) Cubic has treated the system as Iranian property

Cubic admittedly in early 1979 "agreed to store the equipment for the Iranian Air Force and "informed the IAF that it was packing the equipment for storage, as promised pending further advice from the IAF". Doc. 236, Cubic, Attachment 4 at 3.

b) Cubic was to sell the system, not as an owner, but as Iran's proxy

Cubic, as the record bears out, did not set about selling the equipment as its own, but on behalf of Iran. As noted in the ICC Award, Cubic in its letter of 20 May 1979, specifying the purpose of the ongoing negotiations at the time, suggested that:

> "C. DMOND [Iran] will give Cubic Corporation *lawful authority to sell the system* and make all required modification to the new customer specification prior to the sale . . . (This system has been built according to Iranian specifications). Needless to say that

> Cubic Corporation will deduct the *costs of any modification* to the system and claim a fair percentage as a brokerage fee (Defence and Counterclaim Exh. 71 in the translation of Cubic's legal expert Mr. Kativai). ICC Award at para 9.9.

Cubic again stresses its role as a broker with regard to proposed sale at the conclusion of that letter saying:

> "The status of the sale, in case of sale by this Corporation ("Respondent"), with respect to the *cost* of the necessary changes for the new buyer and *brokerage fee*, would be determined". ICC Award at para 9.11.

It was accordingly agreed by the parties, as found by the ICC, that "Cubic would try to *resell* the equipment". ICC AWARD, para 9.15.[5]

Viewed against this factual background, Cubic sold the ACMR to the Canadian Government on 16 September 1981, not as a principal or owner of the property, but in the capacity of a proxy on behalf of the Iran. Cubic did so without informing Iran of the sale in an obvious breach of its proxy responsibilities. Iran was, therefore, under the impression that Cubic had

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[5] Cubic' original proposal was that "Cubic would ship the system to Iran and Iran would sell it." ICC AWARD, para. 9.16(b). The second proposal related to the resale of the system by Cubic itself. *Id*. It was Major Makooei, from Iranian Air Force, who suggested that CUBIC sell the ACMR to a foreign country. ICC Award, para. 9.4. Attachment No. 2.

not succeeded in selling the system, when filing a claim with the Tribunal. As ICC has noted:

> "In view of the Cubic's unwillingness to adequately inform Iran on its resale efforts, Iran could reasonably but erroneously understand that such efforts had remained unsuccessful and that the system for which it had paid more than USD 12m, stood still practically ready to be installed and operated in Iran. When understood in such context, Iran's claim brought before the Iran-U.S. Claims Tribunal for fulfillment of Cubic's obligation to deliver and operate the system was not inconsistent with the assumption of an agreement that Cubic should first attempt to resell the system." ICC Award, Attachment No. 2, at para 10.8.[6]

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[6] The ICC further noted in the same para that:

"At this point of time, [when a claim was filed with this Tribunal against Cubic and the U.S. Government in January 1982] roughly two and half years had elapsed since the Parties had mutually agreed that the System should, if possible, be resold. During this long period, Cubic never informed Iran about its efforts to sell the equipment. When Iran began to inquire in 1981 about Cubic's willingness to enter into settlement negotiation as provided for in the Algiers Declaration of January 19, 1981, Cubic declined on October 21, 1981, to attend any meeting unless Iran would specify the outstanding issues relating to the "former contractual relation" which Iran wished to discuss (Defense and Counterclaim, Exh. 83 to 86). At that point of time, approximately one month had

(Continued on following page)

iii) Iran's beneficial ownership

Iran's Ownership of the ACMR, as a beneficial owner, may not be conveniently rejected in the face of a callosal [sic] payment of over U.S. $ 12 million of the contract price.[7] This payment, substantial as it is, could – as found by the ICC – "reasonably" lead Iran to believe that the system "stood still practically ready to be installed and operated in Iran". *Id.*

iv) Modifications cannot adversely affect Iran's ownership

The modifications effected on ACMR to make it suit the Canadian Government's required specifications does not negate Iran's ownership, nor does it transform Cubic's title of proxy into that of an owner. The implementation of these modifications had clearly been envisaged in Cubic's mandate for the sale of the system. *See* p. 6 supra.

In this connection, it is significant to note that, as attested by Cubic itself, the modifications done on the ACMR to adopt the Canadian Government's specifications required no more than 25,000 design man-hours. *See* Attachment No. 3 (Cubic's Memo of Discovery filed with the ICC, Vol. 11, Exh. 10, p. 16). This number of man-hours, compared to over 113,866

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elapsed since Cubic had signed an agreement with the Canadian Government for the sale of an ACMR."

[7] The total payments made to Cubic is U.S. $12,608,519. *See* Attachment No. 5.

man-hours spent for the design of the Iranian ACMR alone (*See* Attachment No. 4 Cubic's Statement of Qualification, Vol. 14, Exh. 2), is not substantial. The value of these modifications – on analogy with the Cubic's offer of an estimated modification cost of U.S.$1,450,000[8] for the sale of the ACMR to the U.S. Navy (*See* Attachment No. 4, Cubic's Statement of Qualification, Vol. 14, Exh. 4) – is less than 1/8 of the approximate amount of U.S. $12,608,519 paid to Cubic by Iran.

The ICC Award, though beset with inconsistencies and legally unjustifiable conclusions, takes note of the fact that Iran's ACMR was substantially used for the completion of the ACMR sold to Canada saying:

> " . . . Cubic had signed an agreement with the Canadian Government for the sale of an ACMR which allowed it to *reuse substantial parts* of the equipment manufactured for Iran (Sects 12.14 and 14 infra)". ICC Award, para 10.8. Attachment No. 2.

It also likewise confirms that:

> " . . . Cubic was able to reuse *important parts* thereof [of Iran's ACMR] in its sale to

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[8] The figure of U.S.$1,450,000 included – in addition to the modification cost – charges for installation, integration and flight test. As was also extensively testified by the experts, Mr. Van Aker and Mr. Hammer, at the ICC Hearing, the system was a "universal" or "standard" one, hence did not need the extensive modifications claimed by Cubic. *See* Cubic Hearing Minutes of 8-9 Nov. 1995, pp. 434, 461 and 510 at Attachment No. 7.

Canada and other components were sold to various agencies of the U.S. Government." *Id.* para. 15.6.

4. *U.S. Argument:*

"In addition, Iran caused its own loss by breaching and repudiating the Contract." Doc. 236, Cubic, at 3, note 3.

Iran's Answer:

The United States does not support this allegation of breach with a scintilla of evidence. The factual background recounted above, in fact, clearly establishes the baselessness of this assertion. As found by the ICC with a view to the parties' contacts and correspondence,

> "[T]he Parties agreed in 1979 to *discontinue* the Contracts at least for the time being; i.e. until the results of Cubic's attempt to resell the system would be known". ICC Award, para 10.11. Attachment No. 2.

It is therefore unknown on what basis the United States maintains that Iran terminated and repudiated the Contract. Does the United States believe that Iran should have continued to make additional payments to Cubic despite the parties' agreement for the discontinuation of the Contract? But, there is no legal foundation for such a position. The ICC, too, categorically rejected a similar suggestion by Cubic, holding that:

> "[I]t follows from Cubic's own proposal that *no further payments were to be made by Iran* prior to the resale". ICC Award, para 9.18. *See* also *Id.* para 9.19 9.20 and 10.4(c).

And finally, supposing there was some kind of breach of contract on the part of Iran, how would that violation make Iran's established ownership of the items disappear? There is, of course, no room for such an argument under Iranian law, or possibly in any other system of law. *See* also Iran's Reply at 4.2.1.

III.

DESCRIPTION OP ATTACHMENTS

Attachment No. 1: Excerpts from CUBIC-Canadian Government's Agreement of 16 September 1981.

Attachment No. 2: Excerpts from ICC FINAL AWARD (5 May 1997).

Attachment No. 3: Excerpts from Cubic's Memo of Discovery, filed with the ICC, Vol. 11, Exh. 10 of Cubic's filing with ICC, p. 16.

Attachment No. 4: Excerpts from Cubic's Statement of Qualification, Vol. 14, Exhs. 2 & 4 of Cubic's filing with ICC.

Attachment No. 5: Evidence of total payment of U.S. $12,608,519 to Cubic.

Attachment No 6: Excerpts from the original Iran-Cubic contract evidencing the number of generators to be procured and the AIS to be produced.

Attachment No. 7: Excerpts from ICC's November 1995 Hearing Minutes containing expert testimony that ACMR (the equipment at issue) was of universal application.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 03-55015

THE MINISTRY OF DEFENSE AND
SUPPORT FOR THE ARMED FORCES
OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioner-Appellant

vs.

CUBIC DEFENSE SYSTEMS, INC.,
Respondent

vs.

DARIUSH ELAHI
Appellee

On Appeal From an Order of the United States
District Court for the Southern District of California

BRIEF OF APPELLANT

(Filed Apr. 11, 2003)

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* * *

[32] **5. Finally, the Iranian Assets Control Regulations Prohibit Attachment of the MOD Judgment.**

In response to the 1979 hostage crisis, the United States blocked all property in which the Government of Iran had an interest in. See Executive Order 12170, 44 Fed. Reg. 65729 (1979). Virtually all Iranian properties were and remain blocked by Executive Order 12170, 44 Fed. Reg. 65729 (1979), issued pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§1701 *et seq.* 31 C.F.R. §535.201. On attachment of blocked property, the regulations issued pursuant to the Executive Order provided:

> [u]nless licensed or authorized pursuant to this part **any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void** with respect to any property in which on or since the effective date there existed an interest of Iran. 31 C.F.R. §535.203(e). (Emphasis added).

The property at issue here is a liquidation to a monetary amount of a military asset manufactured by Cubic and owned by MOD. Such property is property with [33] respect to which financial transactions are prohibited *or regulated* pursuant to 50 U.S.C. § 1702 which provides in pertinent part:

"§ 1702. Presidential authorities

(a)(1) At the times and to the extent specified in section 202 [50 U.S.C. § 1701], the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise –

(A) investigate, regulate, or prohibit –

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States."

This statute has been implemented through regulations promulgated by the Office for Foreign

Assets Control; specifically 31 C.F.R.[4] §§ 535 and 560, relating, respectively, to assets of Iran in the United States and transactions with Iran by United States persons.

31 C.F.R. 535.201 regulates property of Iran in the following terms:

> [34] "No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized."

In addition, these regulations define property to:

> "include, **but not by way of limitation,** money, checks, drafts, bullion, bank deposits, . . . , **debts, indebtedness**, . . . any other evidences of title, ownership or indebtedness, . . . **judgments**, . . . and any other property, real or personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent." (Emphasis added). 31 C.F.R. §535.311 (1999).

In the same vein, 31 C.F.R. 560.201 prohibits, "except as otherwise authorized pursuant to this Part", "engaging in any transaction or dealing in or

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[4] Code of Federal Regulations hereinafter referred to as "C.F.R.".

related to: goods or services of Iranian origin or owned or controlled by the Government of Iran". While it might be argued that the MOD Judgment is not goods or services owned by Iran, it seems clear that it *relates to* goods or services owned or controlled by the government of Iran, whether or not prohibited.

In short, the Iranian Assets Control Regulations prohibit financial transactions and, more importantly, attachments with respect to virtually all Iranian property within the jurisdiction of the United States.

Clearly, enforcement of such prohibitions avoids improper interference with the President's powers in the area of foreign policy. As the Supreme Court explained in [35] *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981), sanctions regimes and blocking programs are an integral component of the nation's foreign policy. IEEPA gives the President, in times of declared "national emergency," the broad authority to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit" (among other actions) a wide variety of interests and transactions concerning "any property in which any foreign country or a national thereof has any interest." 50 U.S.C. §§1701, 1702. The Supreme Court has referred to "the broad authority of the Executive when acting under this congressional grant of power." *Dames & Moore, supra,* 453 U.S. at 672. Blocking assets is an important foreign policy tool that provides a critical "'bargaining chip' to be used . . . when dealing with a hostile country." *Dames & Moore v. Regan*, 453 U.S. 654 at 673. In that case, the Court went on to uphold a

Presidential order nullifying previously authorized prejudgment attachments on blocked Iranian property:

> [i]t is difficult to accept petitioner's argument [that the President did not have such power] **because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments, garnishments, or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result.** *Id.* at 673-74. (Emphasis added).

The rule of *Dames & Moore* is particularly significant here. After all, the proper appropriation of power among the branches of government in the area of foreign policy [36] has been debated since the Framers first contemplated the constitutional framework. The Supreme Court has generally accepted the Framers' view of the Executive's power in foreign affairs and has usually deferred to Presidential actions in this area while restricting Congress's power to intervene and it did so in *Dames & Moore*. The Iranian Assets Control Regulations which involve matters of foreign policy remain in effect and prohibit attachment of the MOD Judgment.

Moreover, it should be noted that the underlying dispute between the MOD and Cubic concerning Cubic's failure to deliver the ACMR to Iran is at issue

in claims against the United States before the Iran-United States Claims Tribunal. (Excerpt No. 1, CR 85, Almassi Declaration, Exhibit "1" and "2").

Following the 1979 revolution in Iran, the detention of certain United States nationals in Iran and the imposition of sanctions against Iran by the United States, in January of 1981, the governments of Iran and the United States, through the government of Algeria serving as an intermediary, agreed to adhere to certain commitments in an effort to mutually resolve all pending disputes. The commitments were outlined in a General Declaration known as Declaration of The Government of the Democratic and Popular Republic of Algeria (the "Declaration") which specifically provided:

> [37] General Principles
>
> * * *
>
> Within the framework of and pursuant to the provisions of the two Declarations . . . the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction . . .

Moreover, Paragraph 9 of the Declaration stated the following:

> Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement . . . ,

> the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad . . . (CR, 87, Exhibit "G").

In the event of a dispute arising out of the provisions of the Declaration, the two governments agreed to submit the dispute to binding arbitration before a tribunal established by and in accordance with the provisions of another agreement entered into by the two governments known as the Claims Settlement Agreement. *Dep't of State Bull.* No . 2047 Feb. 1981 at 3.

Pursuant to the Claims Settlement Agreement an arbitral tribunal, the Iran-U.S. Claims Tribunal ("Claims Tribunal"), was established in The Hague, The Netherlands, to handle claims between the two parties and their nationals arising out of the disputes subject to the Claims Settlement Agreement.

When the United Stated failed to adhere to its commitments under the [38] Declaration and refused to transfer certain Iranian assets, including those at issue in the Cubic matter, Iran was forced to file a number of claims with the Claims Tribunal. Two such cases are Case No. A/15(seeking transfer of non-military assets) and Case No. B/61(seeking transfer of military assets including those at issue with Cubic).

In *Case No. B/61, (Full Tribunal)* Iran lodged a complaint with the Claims Tribunal seeking compensation from the United States for its failure to transfer to it certain military properties, including the ACMR, owned by Iran through MOD, as had been agreed by the parties.

In a partial award in Case No. A/15 the Claims Tribunal determined that the United States indeed was liable for the return of the equipment or its value. Case A/15(II:A and II:B) 28 *Iran-U.S Claims Tribunal* 112 (1992). (Excerpt No. 1, CR 85, Almassi Decl., Exhibit "1".) This partial award is equally applicable to Case No. B/61 and the scope of United States' liability and the amount of compensation awarded to Iran in both cases will be determined on the basis of the partial award rendered in Case No. A/15. (Excerpt No. 1, CR 85, Almassi Declaration, Exhibit "2".)

Therefore, the asset at issue between Cubic and MOD in the instant case is at issue in Case B/61 between the United States and Iran in an international tribunal. Case No. B/61 seeks transfer of military assets including those at issue with Cubic and is against the United States. A loss or victory in the action between Cubic and MOD [39] would enlarge or diminish, respectively, Iran's claim against the United States in The Hague.

In light of the fact that the dispute between these two sovereign countries is before an international tribunal, any attachment of the MOD Judgment

would be inappropriate and unwarranted. See *Adams v. Vance*, 570 F.2d 950, 955 (D.C. Cir. 1978) (courts must be wary of intruding into foreign affairs to, among other things, " . . . 'avoid fixing of our government's course' by premature interposition") (quoting *Nielson v. Secretary of Treasury,* 424 F.2d 833, 855 (1970)).

* * *

PETITIONER'S BRIEF

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(7)

No. 07-615

Supreme Court, U.S.
FILED
SEP 8 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Is an attachment against foreign sovereign property permissible when that property is "at issue in claims against the United States before an international tribunal," and that property is not a "blocked asset," pursuant to the terms of the 2000 Victims of Trafficking and Violence Protection Act and the 2002 Terrorism Risk Insurance Act?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption. In earlier proceedings, Cubic Defense Systems, Inc., participated as a nominal party, and Stephen M. Flatow was a plaintiff-intervenor in the district court and an appellant in the court of appeals. See Pet. App. 38, 81.

RULE 29.6 NOTICE

Petitioner, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, is a constituent part of a foreign state, within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a), and has no shareholders or parent corporations. See Pet. App. 25.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit, of July 17, 2007, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc*, is reported at 495 F.3d 1024 (9th Cir. 2007), and reprinted at Pet. App. 5. This amended opinion replaced an earlier opinion by the same panel of May 30, 2007, reprinted at U.S. Pet. Amicus Br.1a.

The Ninth Circuit opinion was issued in response to a *per curiam* opinion of this Court, granting a petition for writ of certiorari filed by petitioner, vacating an earlier opinion of the Ninth Circuit, and remanding for further proceedings. See 546 U.S. 450 (2006). That October 7, 2004, opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit was reported at 385 F.3d 1206 (9th Cir. 2004), and is reprinted at Pet. App. 38. That decision was from an appeal of an order from the U.S. District Court for the Southern District of California of November 26, 2002, 236 F. Supp.2d 1140 (S.D. Cal. 2002), reprinted at Pet. App. 81.

An earlier order of the U.S. District Court, granting a petition confirming a foreign arbitral award was of December 8, 1998, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, is reported at 29 F. Supp.2d 1168 (S.D. Cal. 1998), and reprinted at J.A.55.

STATEMENT OF JURISDICTION

Petitioner seeks review from the amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of July 17, 2007. The Ninth Circuit denied a petition for rehearing en banc on that same date. Pet. App. 4. The Petition was filed November 7, 2007, and granted on June 23, 2008.

The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

The crucial questions for review by this Court are controlled by the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000), Pet. App.107, reprinted in the Appendix to this Brief ["App."] at 1a; by the Terrorism Risk Insurance Act (TRIA) of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002), Pet. App. 112, reprinted in App. 6a; and the International Economic Emergencies Powers Act (IEEPA), 50 U.S.C. § 1701 et seq.

Also at issue in this case are the United States' treaty obligations under the 1981 Algiers Accords with Iran, more formally known as the Declarations of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Iran-U.S., 20 I.L.M. 224 (1981); Dept. of State Bull. No. 2047, Feb. 1981 at 1; 1 Iran-U.S. Cl. Trib. Rep. 3 (1983); reprinted at App. 14a.

STATEMENT

A. The Iran-U.S. Claims Tribunal and *Case B61*

1. As part of the resolution of the crisis in relations between the Islamic Republic of Iran ("Iran") and the United States, the two nations concluded the Algiers Accords on January 19, 1981. See 14 I.L.M. 224; App. 14a; see also *Dames & Moore v. Regan*, 453 U.S. 654, 662-66 (1981). For purposes relevant here, the Algiers Accords are divided into two instruments. The first was known as the General Declaration, App. 14a, which sets forth the obligations of the parties in respect to their international relations, including that the "United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979 [the freezing of Iranian assets by the U.S. in the wake of the hostage crisis]" and "ensur[ing] the mobility and free transfer of all Iranian assets within its jurisdiction. . . ." App. 14-15a. The "free transfer" obligation was derived from paragraph 9 of the General Declaration. App. 18a ("the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad.").

Any dispute over "the interpretation or performance" of these obligations under the General Declaration, App. 19a (¶17), was to be referred to the tribunal established by the Claims Settlement Declaration (CSD), the second part of the Algiers Accords. App. 19a. The CSD established a complex jurisdictional structure for the Iran-U.S. Claims Tribunal ("Claims Tribunal") at The Hague. The

Tribunal was granted jurisdiction over the claims of private U.S. entities against the Iranian government (and allowed such claims to be privately pursued at the Tribunal without the need for espousal or diplomatic protection in certain circumstances), provided that certain subject-matter, party-identity, continuity and procedural requisites were satisfied. See App. 20a (art. II(1)), 22a (art. III(4)), 23-24a(art. VII). In addition to private claims, the Tribunal was granted jurisdiction over "official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services." App. 20a (art. II(2)). Lastly, the Tribunal was given jurisdiction "as specified in Paragraphs 16-17 of the [General] Declaration. . . over any dispute as to the interpretation or performance of any provision of that Declaration." App. 20-21a (art. II(3)).[1]

2. Iran initiated *Case B61* before the Tribunal as the claimant. *Case B61* involves the dispute over the obligation of the United States to return Iranian military properties situated in the United States as of the date of the Algiers Accords, and which were mainly in the possession of private contractors, whether or not as part of the Foreign Military Sales (FMS) program. Based on the United States' obligations under the General Declaration to "arrange, subject to the

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[1] In the Tribunal's practice, cases calling for the interpretation of the Algiers Accords are given the prefix of "A" (as in "*Case A18*"); official claims are given a "B" prefix (as in "*Case B1*").

provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States," see App. 14-15a (¶A), 18a (¶9), Iran sought the return of these properties or assets, or, in the alternative, the receipt of replacement value for them from the United States government. As a presidential statement to Congress of May 16, 1996, indicated:

> Case B/61 involves a claim by Iran for compensation with respect to primarily military equipment that Iran alleges it did not receive. Iran had sought to purchase or repair the equipment pursuant to commercial contracts with more than 50 private American companies. Iran alleges that it suffered direct losses and consequential damages in excess of $2 billion in total because of the United States Government refusal to allow the export of the equipment after January 19, 1981, in alleged contravention of the Algiers Accords.

President Clinton's Message to the Congress on Iran, May 16, 1996, available at http://clinton6.nara.gov/1996/05/1996-05-16-report-on-national-emergency-with-respect-to-iran.html (visited Aug. 9, 2008).[2]

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[2] Petitioner does not endorse, in all respects, the United States government's characterization of Iran's claim in *Case B61*, but this statement is nonetheless illustrative of the subject-matter of the case.

Case B61 involves mainly Iranian military property that was held by private parties in the United States as of the date of the Algiers Accords, as distinct from military equipment held by the United States (which is at issue in the *B1 Case*) or non-military equipment (the subject of the *A15 Case*). The Claims Tribunal had already issued an Award in the *A15 Case*, holding that the United States is under an obligation, by virtue of paragraphs A and 9 of the General Declaration, App. 14-15a, 18a, to compensate Iran for the losses incurred as a result of the U.S. rejection to permit the transfer of the properties. See *Islamic Republic of Iran v. United States*, Partial AWD 529-A15-FT, ¶¶77(d), (e), (g) & (i) (May 6, 1992), 28 Iran-U.S. C.T.R. 112 (1992) (sub-claims II:A & II:B).

B. The Cubic Contract, Arbitration, and Judgment

1. In October 1977, the predecessor of the petitioner, the Ministry of Defense ("MOD") of the Islamic Republic of Iran, entered into a pair of contracts with Cubic Defense Systems, Inc. ("Cubic"), a California-based defense firm, relating to the sale and servicing of an air combat maneuvering range (ACMR) for use by the Iranian Air Force. See *Ministry of Def. of the Islamic Republic of Iran v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168, 1170 (S.D. Cal. 1998); J.A.55, 56-57; see also J.A.34, 37-40. The parties chose Iranian law as the substantive law governing the contracts. See J.A.23 (¶IV), 40 (¶7.1). In the event of a dispute under the contracts, arbitration was to take place in Switzerland, "in accordance with the laws of the Government of Iran in effect as of the date of th[e] contract." See J.A.23 (¶IV), 39 (¶2.6) (quoting Sales

contract art. XII.15 & Service contract art. XI.18).

Following the Iranian Revolution of 1979, delivery of the equipment did not take place for reasons that were disputed. See J.A.56-57; see also J.A.42-45. MOD made partial payments for the ACMR but never received the equipment. Cubic then breached the contract and sold the ACMR to Canada and never remitted the proceeds of that sale to MOD. See J.A.25 (¶VIII), 45-47, 56-57; Pet. App. 6.

2. In January 1982, MOD filed claim B66 before the Claims Tribunal, against both Cubic and the United States, seeking recovery of the contractual damages arising from the failure to deliver, install and operate the ACMR. See J.A.25-26 (¶IX), 57; Pet. App. 6-7. The United States argued before the Tribunal that MOD's claim in *Case B66* was "duplicative of part of the claim in Case No. B61, another 'official' claim filed by MOD against the United States . . . insofar as the claim in Case No. B61 raised issues concerning the interpretation or performance of Contract No. 134 [the Cubic Contracts] pursuant to the General Declaration [of the Algiers Accords]." See *Ministry of National Defense of the Islamic Republic of Iran v. United States & Cubic Corp.*, AWD 302-B66-1, at ¶4 (Apr. 28, 1987), 14 Iran-United States Claims Tribunal Reports ["Iran-U.S. C.T.R."] 276 (1987), reprinted in App. 25a, 26-27a.

In an Award dated April 28, 1987, the Claims Tribunal dismissed *Case B66* for lack of jurisdiction under the Algiers Accords. The Tribunal held that MOD's claim against Cubic was barred by its earlier interpretative ruling of the Algiers Accords, "that the General Declaration and the Claims Settlement

Declaration do not confer jurisdiction over claims by Iran against United States nationals." App. 28a (¶11) (citing *Case A2*, DEC1-A2-FT (Jan. 26, 1982), 1 Iran-U.S. C.T.R. 101 (1982)).

As for MOD's direct claim against the United States for failing to deliver the ACMR, the Tribunal ruled that because the United States "was not named as a party to either of the [Cubic] Contracts" and had "assumed [no] obligations under the Contracts," there was no direct contractual relationship between MOD and the United States that would allow, under the Tribunal's jurisdiction, an official contractual claim to proceed. See App. 27-28a (¶9). The Tribunal was careful to hold, however, that dismissal of MOD's contractual claim against the United States was without prejudice to Iran's analytically distinct claim against the United States for violation of its obligations under the Algiers Accords, requiring the "mobility and free transfer of Iranian assets within its jurisdiction." See Algiers Accords, General Decl., General Principle A; App. 15a. As indicated in the Tribunal Award in *Case B66*, "[t]he Tribunal's dismissal of the claim against the United States in the present case is without prejudice to any findings it may make concerning Contract No. 134 in Case No. B61." *Case B66*, App. 28a (¶10).

3. Assured in its understanding that the Claims Tribunal was not the proper forum for its direct contractual claim against Cubic, in September 1991 MOD filed, pursuant to the terms of the contracts, a request for arbitration with the International Chamber of Commerce (ICC) in Zurich, Switzerland. See J.A.26

(¶XI), 57. After submissions from both MOD and Cubic, and lengthy proceedings, see J.A.26-31, 57-58, the ICC panel ruled in favor of MOD and issued a Final Award requiring Cubic to pay MOD $2.8 million. See J.A.35, 53 (¶21.1), 58.

The ICC Award ruled that MOD was contractually entitled to be reimbursed for progress payments it had already made to Cubic for the ACMR and Cubic's breach largely arose from its failure to remit to MOD the proceeds of the later Canadian sale of the ACMR. See J.A.45 (¶11.28). The ICC panel calculated the salvage value of the ACMR based on its subsequent physical reconfiguration as the basis of its $2.8 million award to MOD. See J.A.38-39 (¶2.3), 45-47. MOD's contractual recovery in the ICC proceeding was determined by the amount of payments MOD had made to Cubic ($12.6 million), less amounts Cubic had expended to prepare the ACMR for delivery ($10.5 million) and Cubic's profit allowance ($3.5 million), plus the ACMR's salvage value ($4.2 million). See J.A. 47 (¶18.1). The ICC panel calculated contractual interest as running from the date of the commencement of the ICC arbitration, see J.A.53 (¶19.7), and not the January 1982 initiation of proceedings before the Claims Tribunal in *Case B66*, which the ICC characterized as "premature." J.A.51 (¶19.5(d)).

4. In June 1998, MOD filed a petition in the U.S. District Court for the Southern District of California, seeking to confirm the award entered by the ICC pursuant to the New York Convention, opened for signature June 10, 1958, 21 U.S.T. 2517, reprinted in 9 U.S.C.A.§ 201 note. See J.A.21, 22 (¶III). The

district court granted MOD's petition and confirmed the ICC Award on December 7, 1998. J.A.55, 68. Both Cubic and MOD took cross-appeals of the district court's confirmation decision (the "Cubic judgment"), and those appeals remain pending. The merits of the dispute between MOD and Cubic are not otherwise before this Court.

5. As part of the proceedings before the Claims Tribunal in *Case B61*, the Agents of the United States and Iran[3] respectively made filings regarding the character of the case and its connection to the ICC award in the Cubic arbitration. Iran's Agent indicated, in Statement No. 16 filed in *Case B61*, see Decl. of Mina Almassi, Case No. 98-1165, Dckt.85, ¶7 & Ex. 2 (filed Sept. 13, 2002); J.A.70, 71, 72, that "the market price of the equipment [the ACMR], constituting Iran's remedy in the main, is the same amount of which the items were sold to the Canadian Government on 16 September 1981." J.A.73 (¶3). After discussing the ICC Award, the Iranian Agent before the Claims Tribunal represented that "Cubic has not, thus far, paid Iran the awarded sum of U.S.$2,808,519, nor is there any prospect of such payment. This amount, if received, will be recuperated from the remedy sought" against the United States in *Case B61*. J.A.76 n.2.

This understanding was confirmed by the United States Agent before the Tribunal in a September 1, 2003, filing. See Rebuttal of the United States to

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[3] For the authority of Agents at the Tribunal, under the Algiers Accords CSD, see App. 23a (art. VI(2)).

Claimant's Reply, *Case B61*, Statement No. 16 (Cubic Corporation), at 24 & n.32 (Sept. 1, 2003); reprinted at App. 30a. The U.S. Agent noted that

> If the Tribunal awards Iran any compensation on this claim, it must deduct the amounts that Iran has already been awarded for these Items by the ICC: a total amount of $4,751,069.00 in compensation and interest. . . . Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent letters to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the ICC Award it would "be recouped from the remedy sought against the United States in Case B61." Letter from M.H. Zahedin-Labba[f], Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999).

App. 31a & n.32.

C. Status of Iranian Assets in the U.S.

1. In response to the crisis in relations between Iran and the United States in November 1979, the President exercised his powers under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701, 1702, and "blocked all property and interests in property of the Government of Iran. . . subject to the

jurisdiction of the United States." Exec. Order (EO) No. 12170, 3 C.F.R. 457 (1980); see 31 C.F.R. 535.201. On the day the Algiers Accords were concluded in January 1981, the President directed the transfer to Iran of some, but by no means all, Iranian financial assets under U.S. jurisdiction. EO 12277-12280, 3 C.F.R. 105, 107, 109, 110 (1982); see 31 C.F.R. 535.211-535.214. The President also directed that most other Iranian property be transferred to Iran "as directed. . . by the Government of Iran,"EO 12281, 3 C.F.R. 112 (1982); 31 C.F.R. 535.215, but with a number of caveats and conditions that would later become the subject of litigation between the two countries before the Claims Tribunal. Finally, the President lifted the earlier prohibitions against transactions in Iranian property, EO 12282, 3 C.F.R. 113 (1982), which the Treasury Department implemented by issuing a general license authorizing "[t]ransactions involving property in which Iran" has an interest where: "(1) The property comes within the jurisdiction of the United States. . . after January 19, 1981, or (2) The interest in the property of Iran. . . arises after January 19, 1981." 31 C.F.R. 535.579(a).

2. In the 2000 Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000); App. 1-5a, Congress established a system for the payment to individuals of damage awards procured by virtue of suits brought under section 1605(a)(7) of the Foreign Sovereign

Immunities Act (FSIA).[4] See id. § 2002(a); App. 1-3a. This mechanism provided for direct payments from the U.S. Treasury to the affected individual, and for the United States to be subrogated to the interests of such individuals, after payment was made. See id. § 2002(c); App. 4-5a. Those who accepted any payment under VTVPA automatically relinquished certain rights, including their right to pursue punitive damages and, depending on the amount of compensatory damages they received, their right "to execute against or attach property that is at issue in claims against the United States before an international tribunal, [or] that is the subject of awards rendered by such tribunal." Id. § 2002(a)(2)(B)-(D), 114 Stat. 1542, App. 2-3a.

Congress in 2002 enacted the Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, tit. II, § 201 116 Stat. 2322 (2002), codified at 28 U.S.C.§ 1610 note; App. 6-13a. TRIA section 201 permits persons who obtained a judgment against a party on a claim based on an act of terrorism, within the waiver of immunity under FSIA section 1605(a)(7), to execute against or attach the blocked assets of a terrorist party, subject to substantial limitations, in order to satisfy the judgment

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[4] Section 1605(a)(7) provides an exception to the general rule of foreign state immunity under the FSIA, 28 U.S.C. § 1604, for certain claims against designated state sponsors of terrorism. 28 U.S.C. § 1605(a)(7). Congress recently repealed Section 1605(a)(7), and replaced it with a revised terrorism-related exception. See Act of Jan. 28, 2008, Pub. L. No. 110-181, § 1083(b)(1)(A)(iii), 122 Stat. 341; § 1083(a)(1), 122 Stat. 338 (enacting 28 U.S.C. § 1605A).

to the extent of any compensatory damages for which that party has been adjudged liable. See id. § 201(a); App. 6-7a.

One important aspect of applying this statute involves the determination of whether the assets sought to be attached constitute "blocked assets" within the meaning of the enactment. See id. § 201(d)(2); App. 12a (cross-referencing IEEPA, 50 U.S.C.§ 1701 et seq., and the Trading with the Enemy Act, 50 U.S.C. App.§ 5(b)). If a particular property was not characterized as a "blocked asset" under TRIA, it was ineligible for attachment or execution in satisfaction of a judgment procured under FSIA section 1605(a)(7). See id. § 201(a); App. 6-7a.

TRIA also amended portions of VTVPA pertaining to the payment system for victims of terrorist attacks having judgments procured against Iran under the waiver of foreign sovereign immunity in FSIA section 1605(a)(7). See TRIA, § 201(c); App. 7-12a. The major change made was that individuals who received "less than the full amount of compensatory damage awards" from the U.S. Treasury under the compensation scheme were required to relinquish their rights to subsequently execute against or attach any Iranian property in the United States that "is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal." TRIA, § 201(c) (amending VTVPA § 2002(d)(5)(B)); App. 11a. TRIA allowed for the promulgation of guidelines by the Treasury Department to effectuate payments and secure the proper relinquishments of executions or attachments

against Iranian property in the United States. TRIA, § 201(c) (amending VTVPA § 2002(d)(6)), App. 11-12a; see also 68 Fed. Reg. 8077, 8079-80 (Feb. 19, 2003).

3. On October 25, 2007, after the decision of the Ninth Circuit from which review is sought here (see below), the Department of State designated, under Executive Order 13382, an entity known as the Iranian Ministry of Defense and Armed Forces Logistics (MODAFL) as having engaged in activities relating to the proliferation of weapons of mass destruction. 72 Fed. Reg. 71,991-71,992 (Oct. 25, 2007).

D. Elahi's Attachment and Proceedings Below

1. On October 23, 1990, Dr. Cyrus Elahi was killed in Paris, France. See Pet. App. 5; see also *Elahi v. Islamic Republic of Iran*, 124 F. Supp.2d 97, 103 (D.D.C. 2000). In 2000, Dr. Elahi's brother, Dariush Elahi, filed suit against Iran and its Ministry of Information and Security ("MOIS") in the District Court for the District of Columbia for wrongful death. The Iranian government did not enter an appearance with that court, and the district court therefore entered a default judgment in favor of Elahi in December 20, 2000. Id. at 99-100. The judgment against Iran was for compensatory damages in the amount of $11,740,035, and punitive damages of $300 million. Id. at 115.

2. a. In November 2001, Elahi registered in the Southern District of California the default judgment against the Islamic Republic of Iran, procured in the District of Columbia. Elahi also filed a lien notice and sought to garnish the judgment debt owed MOD by

Cubic. See Pet. App. 80-81; J.A.3 (Dckt.67). Petitioner resisted this attachment or execution, and the district court ruled, in November 2002, that the MOD was not immune from Elahi's action. See Pet. App. 106.

Relevant to this petition, the district court ruled (in relation to the claims of Stephen Flatow, a party not before this Court, see, *supra*, at (ii)) that the Cubic judgment was not "at issue" before the Iran-U.S. Claims Tribunal, and, therefore, it was subject to attachment under TRIA. See Pet. App. 90-92. The district court also found that MOD's interest in the Cubic judgment arose, for purposes of characterization as a "blocked asset" under TRIA, at the time MOD successfully sought to enforce the ICC arbitral award in a U.S. court, in December 1998. See Pet. App. 84, 91; see also 29 F. Supp.2d at 1174.

b. MOD took an appeal to the Ninth Circuit on the district court's rulings favorable to Elahi.[5] The court of appeals (Betty Fletcher, J., writing) reversed some of the grounds held by the district court, but sustained others. See Pet. App. 38.

The Ninth Circuit agreed with the district court's ruling that MOD was liable for satisfaction of Elahi's judgment against a separate ministry and entity of the

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[5] During the pendency of the appeal to the Ninth Circuit, Elahi availed himself of the facility offered by the TRIA's amendments of the VTVPA and received compensation from the Treasury for his default judgment against MOIS. He executed the required relinquishments and waivers provided by regulation, see 68 Fed. Reg. 8077, 8079-80 (Feb. 19, 2003).

government of the Islamic Republic of Iran. Despite the fact that it treated the Islamic Republic of Iran as a foreign state under Foreign Sovereign Immunities Act (FSIA) section 1603(a), and not as an "agency or instrumentality of a foreign state" under FSIA section 1603(b), the court of appeals nonetheless applied the more lenient standard of FSIA section 1610(b)(2), to the Cubic judgment and held that MOD's interest in the Cubic judgment would be subject to attachment by Elahi in satisfaction for his claim against Iran and MOIS. See Pet. App. 65-66.

The Ninth Circuit ruled, in addition, that Elahi's attempted attachment of the Cubic judgment did not violate Treasury Regulations, see 31 C.F.R. pts. 535 & 560, concerning the disposition of Iranian assets in the United States. See Pet. App. 75-76. Significantly, the panel held that, for purposes of the applicability of these regulations, "MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." Pet. App. 76 (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)). See also Pet. App. 55 ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree.").

c. MOD sought review in this Court on that earlier Ninth Circuit ruling, and this Court granted the petition, vacated the panel decision, and remanded for further proceedings. See 546 U.S. 450 (2006) (per curiam). This Court held that the panel may have improperly applied FSIA section 1610(b) (relevant only for "agencies or instrumentalities" of a foreign

sovereign), instead of section 1610(a) (which applies to the foreign sovereign itself). See id. at 451-52.

d. On remand, the panel (constituted as before, with Judge Betty B. Fletcher writing) ordered further briefing on the FSIA issues, as well as those arising under the VTVPA and TRIA. See Pet. App. 9-10. In its most recent opinion, the panel ruled, consistent with the suggestion by this Court, that MOD was a central organ of Iran, exercising core functions of a foreign sovereign, and that the Cubic judgment was immune under the FSIA section 1610(a) from attachment by Elahi, insofar as the property in dispute was not "used for a commercial activity in the United States." See Pet. App. 21-28. MOD concurs with this ruling, which is not otherwise before this Court.

A majority of the panel went on, however, to rule in favor of the validity of Elahi's attachment on alternative grounds, namely, that it complied with the TRIA and VTVPA. The panel held that (1) Elahi had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. Treasury, pursuant to the VTVPA, because the Cubic judgment is not "property that is at issue in claims against the United States before an international tribunal," TRIA, § 201(c)(4); see App. 8-12a; and (2) that the Cubic judgment is a "blocked asset" within the specific meaning of TRIA sections 201(a) and 201(d)(2)(A). See Pet. App. 6-12a.

Circuit Judge Raymond C. Fisher dissented from the panel's holding, see Pet. App. 28-37, indicating that Elahi relinquished any right to attach the Cubic judgment, insofar as that property was intimately

related to a claim before an international tribunal, within the meaning of TRIA section 201(c)(4). Examining the "at issue" language, and construing the relevant TRIA provisions as a whole, Judge Fisher concluded that the panel improperly assumed that MOD had conceded this issue by virtue of its submission made in *Case B61* at the Claims Tribunal. See Pet. App. 35-37.

e. Upon rehearing, the panel slightly modified its opinion to accommodate the objections of the United States as *amicus curiae*, although it declined to alter its holding on the status of the Cubic judgment as a "blocked asset" under the TRIA. See Pet. App. 2-4. The panel's chief amendment was to delete its previous erroneous statement that the Executive Branch had never unblocked any property in which Iran's interest antedated "the Revolution." Pet. App. 3; U.S. Pet. Amicus Br. App. 15a. In its place, the majority inserted a paragraph in which it recognized that "[f]ollowing release of the hostages, the United States unblocked most Iranian assets," but went on to observe that "military goods such as the ACMR remained blocked." Pet. App. 3.

f. This Court subsequently granted review of MOD's petition. 128 S.Ct. 2957 (2008).

SUMMARY OF THE ARGUMENT

I. The decisive issue for review here is whether respondent has relinquished all rights to attach the Cubic judgment because it is "property at issue in claims against the United States before an international tribunal. . . ." TRIA § 201(c); App. 11a. Several structural and textual clues indicate that it was Congress's intent to give a broad ambit to the "at issue" proviso, in order to ensure that private litigants, pursuing their own enforcement tactics with judgments against foreign sovereigns, do not compromise U.S. foreign policy (especially with regard to subrogation interests or efforts to normalize relations with these nations, see VTVPA §§ 2002(c) & (d); App. 4-5a), or the United States' litigation position before international tribunals. Congress's decision to frame the "at issue" caveat in disjunctive form – covering both pending proceedings before international tribunals and the application of awards – is also indicative of a wide scope. Where Congress has used the "at issue" language, or similar formulations, in other enactments, this Court has given it a broadening construction, especially in the foreign relations context. See *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352, 2356-58 (2007).

Since any award that Iran receives from the Claims Tribunal in *Case B61* (concerning U.S. obligations under the Algiers Accords to allow the "free transfer of all Iranian assets within its jurisdiction," App. 15a (¶A)), would be offset by funds due to Iran from the Cubic ICC award, the Cubic judgment is "at issue" before the Tribunal. This has been confirmed in

official communications before the Tribunal, see J.A.76 n.2; App. 31a & n.32, and in the Tribunal's own decisions. See App. 26-27a (¶4), 28a (¶10). This Court should give a "respectful consideration," *Medellín v. Texas*, 128 S.Ct. 1346, 1361 n.9 (2008), to the interpretations of the Claims Tribunal as regards its jurisdiction under the Algiers Accords. And, in case of any doubt, any ambiguity in the TRIA's "at issue" caveat should be resolved consonantly with the United States' obligations under the Algiers Accords with respect to the Tribunal's jurisdiction. See *Murray v. The CHARMING BETSY*, 6 U.S. (2 Cranch) 64, 118 (1804). Likewise, the TRIA's "at issue" proviso should be construed consistently with international law's definition of a dispute as encompassing set-offs and recoupments, which require that any award that Iran receives from the Tribunal in *Case B61* be offset by its recovery of the Cubic judgment. Finally, the imperative importance of maintaining U.S. adherence to the Algiers Accords, see *Dames & Moore v. Regan*, 453 U.S. 654, 660, 673 (1981), strongly counsel that this Court give full effect to TRIA's "at issue" provision.

II. Only if this Court concludes that respondent has not relinquished his right to attach the Cubic judgment, need it address its status as a "blocked asset," under TRIA section 201(d)(2)(A); App. 12a. The Cubic judgment was neither "seized" nor "frozen," within the limited ambit of the TRIA's definition (cross-referencing the Trading With the Enemy Act and the International Emergency Economic Powers Act), because Iran's interest in the Cubic judgment arose after January 19, 1981, and was thus subject to the

general license of 31 C.F.R. § 535.579(a). The property that respondent has attached here is MOD's contractual remedy against Cubic, as actuated through an ICC award, see J.A.38-39, 45-47, and not the military equipment that was the subject of the underlying contracts. Iran's interest in the Cubic judgment could only have arisen in 1998 when the federal court confirmed the ICC award. See J.A.68. The court of appeals' ruling that the Cubic judgment nonetheless remains blocked as "military goods," Pet. App. 19, is simply unsupported by the relevant statutory and regulatory authority. Any doubts as to TRIA's definition of "blocked assets," should be resolved in favor of a construction consistent with the United States' obligations under the Algiers Accords. See App. 15a (General Decl., ¶A), 18a (¶9).

Insofar as the Secretary of State's October 2007 designation of the Ministry of Defense and Armed Forces Logistics alters the Cubic judgment's status as a "blocked asset" is even dispositive for this petition (assuming that Elahi has not otherwise relinquished his right to attach), such has never been raised or resolved below. Substantial fact issues as to the effect of the designation would need to be resolved by the district court. This Court has never, in the first instance, ruled on such intervening developments. See *Lawrence v. Chater*, 516 U.S. 163, 165-67, 174-75 (1996) (per curiam); *Youakim v. Miller*, 425 U.S. 231, 234-37 (1976) (per curiam).

ARGUMENT

I. ELAHI RELINQUISHED ANY RIGHT TO ATTACH THE CUBIC JUDGMENT AS IT IS "PROPERTY AT ISSUE IN CLAIMS AGAINST THE UNITED STATES BEFORE AN INTERNATIONAL TRIBUNAL."

The threshold issue for this Court's determination is whether respondent has relinquished any right to attach or execute against the Cubic judgment under the Terrorism Risk Insurance Act (TRIA) and Victims of Trafficking and Violence Protection Act (VTVPA). If he has, there is obviously no need for the Court to consider whether the Cubic judgment even qualifies as a "blocked asset," within the meaning of the statute. See *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24 (1977).

The crucial statutory language, as derived from the TRIA's amendment of the VTVPA is:

> [a]ny person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall . . . be required to relinquish rights. . . with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

TRIA § 201(c) (amending VTVPA § 2002(d)(5)(B)); App. 11a. It is beyond cavil that respondent has, under the

VTVPA and TRIA, received a disbursement of U.S. treasury funds reflecting at least a portion of the compensatory damages awarded by the U.S. district court by way of default judgment aga inst another ministry of the Islamic Republic of Iran. See 124 F. Supp.2d at 99-100, 115. Indeed, respondent executed the relinquishment presc ribed by regulation under TRIA section 201(c). See App. 11-12a; 68 Fed. Reg. 8077, 8079-80 (Feb. 19, 2003). And, rather obviously, Elahi's garnishment and attachment is an "enforcement against property," also within the scope of TRIA section 201(c). See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

Nor can it seriously be suggested that the Iran-United States Claims Tribunal, established under the authority of the January 1981 Algiers Accords, is not an "international tribunal," within the meaning of the TRIA. See Algiers Accords, Claims Settlement Declaration (CSD), art. II(1); App. 20a ("An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established. . . ."). See also *Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981); *United States v. Sperry Corp.*, 493 U.S. 52, 55-56 (1989).

The only real question for resolution here, then, is whether the Cubic judgment, which respondent has attached in enforcement of its default judgment, is "at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal." TRIA § 201(c); App. 11a. Petitioner submits that the TRIA's "at issue" relinquishment provision should be broadly construed, but, in any

event and under any coherent standard of construction, the Cubic judgment is "at issue" in *Case B61* before the Claims Tribunal.

A. TRIA's "At Issue" Caveat Should Be Broadly Construed.

Several textual and structural clues lead ineluctably to the conclusion that Congress intended a broad construction for the TRIA's "at issue" relinquishment provision. See *Ali v. Federal Bureau of Prisons*, 128 S.Ct. 831, 840 (2008) ("we are unpersuaded by petitioner's attempt to create ambiguity where the statute's text and structure suggest none.").

1. a. Read together, VTVPA and TRIA fashion a comprehensive statutory scheme in which affected individuals holding judgments against certain foreign sovereigns (and otherwise unable to enforce those judgments), could, instead, receive payments from the public fisc. VTVPA §§ 2002(a)(1), 2002(b)(2), 2002(e); App. 1-2a, 4-5(a); see also *Terrorism Risk Insurance Act of 2002*, H. CONF. REP. 107-779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434 ("The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism. . . ."). Congress was understandably concerned that such parties should not be suffered to receive excess payments, or even worse, through further attempts at enforcement, actually embarrass United States' foreign policy objectives, whether the prosecution of subrogation claims against those foreign sovereigns, VTVPA § 2002(c); App. 4-5a, or the ultimate normalization of relations with those nations. See id.

§ 2002(d); App. 5a.[6]

Additionally, Congress wished to ensure that affected individuals who received public moneys in satisfaction of judgments, and who executed the necessary relinquishments, would not later seek to attach assets situated in the United States which were the subject of litigation before any international judicial or arbitral forum. Without such a caveat, private litigants could, through their unrestrained attempts at execution, potentially place the United States in an untenable "whip-saw" by distraining assets that had already been awarded to another nation in international proceedings. Congress was justly concerned that the United States not pay twice for the same judgment: first through the allocation of public moneys (derived through the vesting of foreign assets, diplomatic or consular rental income, or foreign military sales proceeds, see VTVPA § 2002(b)(2); App. 3-4a), and again by way of indemnification to a foreign sovereign the property of which had been wrongly executed against.

Indeed, were respondent to prevail here it would mean that the United States would, in effect, be completely satisfying Elahi's judgment against Iran, without any right of recourse via subrogation, a situation that Congress, in legislating the VTVPA, was expressly intent to avoid. See VTVPA §§ 2002(c) & (d);

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[6] Petitioner's discussion of Congress's intent in legislating VTVPA and TRIA, for purposes of the present brief, is without prejudice to its objections to these enactments.

App. 4-5a. It is no wonder that Congress sought to prevent this result – complicating the defense of international litigation in which the U.S. is a party, and deflecting the payment of judgments against foreign sovereigns onto the U.S. taxpayer – by legislating the VTVPA and TRIA's relinquishment of recourse against certain classes of foreign property and assets in the United States.

b. It is significant that Congress sought to broaden the relinquishment proviso by placing it in a disjunctive form, covering two different aspects of proceedings before an international tribunal: "property that is at issue in claims against the United States before an international tribunal *or* that is the subject of awards by such tribunal. TRIA § 201(c); App. 11a (emphasis added). In other words, property can be "at issue" in a "claim[] against the United States before an international tribunal," or the status of that property can be "the subject of [an] award" by that forum. Id.

Congress clearly contemplated that proceedings before international forums can be protracted. It sought to extend the relinquishment caveat not only to recognizing the legal effect of the judgments, sentences or awards of such tribunals, but also to practically preserving the jurisdiction of such bodies by prohibiting execution against property that was "at issue" in a "claim against the United States." Id. By including the "at issue" proviso, Congress was ensuring that a private litigant's attempt at enforcement against a foreign sovereign's property in the United States would not result later in the United States being unable to comply with the ruling of a tribunal, or, even worse,

being obliged to indemnify the other country for a breach of an underlying treaty obligation in respect to that asset.

c. Congress also made clear, in legislating VTVPA (in language unaffected by TRIA's amendments), that a judgment creditor's waiver of rights under the proviso was expansive: "in the case of payment [either of 110% or 100% of compensatory damages, such affected individual] relinquishes *all* rights to execute against or attach property that is at issue in claims against the United States before an international tribunal. . . ." VTVPA § 2002(a)(2)(D); App. 3a (emphasis added). And while no meta-linguistic implications should necessarily be ascribed to Congress's use of such words as "all" or "any," see *Ali*, 128 S.Ct. at 836 n.4, 844-47 (Kennedy, J., dissenting), 849-50 (Breyer, J., dissenting), the structure and context of VTVPA and TRIA's relinquishment caveat is strongly suggestive that Congress sought a broad ambit for the proviso.[7]

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[7] TRIA's sparse legislative history and textual commands for construction do not contradict this conclusion. TRIA section 201(c)'s statement that "[n]othing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies, . . ." App. 11a, obviously does not speak to the modalities for relinquishing the right to enforce. That "the intent of the Conferees that Section 201 establish that such judgments [in favor of affected individuals] be enforced," *Terrorism Risk Insurance Act of 2002*, H. CONF. REP. 107-779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434, likewise is irrelevant to the matters now before this Court.

2. Congress has employed the "at issue" or "in issue" formulation, or variants thereof, in previous enactments, and these have been given uniformly wide scope. See, e.g., 2 U.S.C. § 1411; 9 U.S.C. § 4; 5 U.S.C. § 7117(b)(1); 18 U.S.C. § 3600(a)(7); 26 U.S.C. § 6330(e)(2) (no suspension of tax levy "while an appeal is pending if the underlying tax liability is not at issue in the appeal"); 28 U.S.C. § 1605(a)(3) (exception to foreign sovereign immunity where "rights in property taken in violation of international law are in issue").

For example, in Fed. R. Civ. P. 42(a), the predicate for the exercise of a court's discretion to "join for hearing or trial any or all matters at issue in the actions" is that the actions "involve a common question of law or fact." Fed. R. Civ. P. 42(a)(1). Indeed, this Court has effectively equated these two elements: a matter is "at issue" in a proceeding when it involves "a common question of law or fact." See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 83-84 & n.8 (2006); *Diamond v. Charles*, 476 U.S. 54, 77 (1986) (O'Connor, J., concurring) ("an action sharing common questions of law or fact with those at issue in this litigation").

This approach is consistent with the expanding definition of "at issue," reflecting its use as a legal term-of-art covering a broad ambit of disputes between contesting parties in litigation.[8] Congress is presumed

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[8] The most recent edition of BLACK'S LAW DICTIONARY reflects this trend, defining "at issue" in rather generic terms as "taking opposite sides," "under dispute" or "in question." BLACK'S LAW DICTIONARY (8th ed. 2004); see also

to legislate in light of the plain-meaning of the terms it employs, and this is especially so in the foreign relations context. See *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352, 2356 (2007) (citing BLACK'S LAW DICTIONARY definition of "lien" contemporaneous with the adoption of the Foreign Sovereign Immunities Act).

Indeed, just two Terms ago, in *Permanent Mission*, this Court had the opportunity to construe the FSIA's exception to immunity in cases where "rights in immovable property situated in the United States are *in issue*." 28 U.S.C. § 1605(a)(4) (emphasis added). This Court adopted a broadening construction of section 1605(a)(4):

> Contrary to petitioners' position, § 1605(a)(4) does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession. Neither does it specifically exclude cases in which the validity of a lien is at issue. Rather, the exception focuses more broadly on "rights in" property.

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining "at issue" as "[i]n question; in dispute"). Previous editions retained the sense, derived from Roman law's principle of joinder of issue (*litis contestatio*) that "at issue" meant when "the parties come to a point in the pleadings [where it is] affirmed on one side and denied on the other. . . ." BLACK'S LAW DICTIONARY 114 (5th ed. 1979); see id. at 842 ("the process of coming to an issue; the attainment of an issue; the issue itself.").

> Accordingly, we must determine whether an action seeking a declaration of the validity of a tax lien places "rights in immovable property. . . in issue."

127 S.Ct. at 2356 (quoting 28 U.S.C. § 1605(a)(4)). A majority of this Court concluded that actions where tax liens were "in issue" were covered by the FSIA's exception to immunity. See id. ("A tax lien thus inhibits one of the quintessential rights of property ownership – the right to convey. It is therefore plain that a suit to establish the validity of a lien implicates 'rights in immovable property'."). In closing, the Court in *Permanent Mission* noted that "[t]he statutory text and the acknowledged purposes of the FSIA make it clear that a suit to establish the validity of a tax lien places 'rights in immovable property. . . in issue'" in the case. Id. at 2358. Given the nearly identical statutory language, the Court should adopt the same broadening construction here.

B. Since Funds Due to Iran from the Cubic ICC Award Would be Recouped From, or Set-Off Against, any Award Against the United States in *Case B61*, the Cubic Judgment is "At Issue" Before the Tribunal.

The United States clearly stands to benefit in proceedings before the Claims Tribunal if the Cubic judgment is released from Elahi's lien and is remitted to MOD. Iran initiated *Case B61* at the Tribunal as the claimant. See App. 30a; see also App. 26a (¶4). *Case B61* is thus a "claim against the United States before an international tribunal," within the meaning of TRIA

section 201(c); App. 11a.

Both the United States and Iran have affirmed, in official representations and filings before the Tribunal, that if MOD receives the proceeds from the Cubic ICC Award, such funds will be deducted, by way of recoupment or set-off, from any award that Iran may receive from the United States in *Case B61*. Iran's Agent indicated, in Statement No. 16 filed in *Case B61*, see Decl. of Mina Almassi, Case No. 98-1165, Dckt.85, ¶7 & Ex. 2 (filed Sept. 13, 2002); J.A.70, 71, that "Cubic has not, thus far, paid Iran the [ICC] awarded sum of U.S.$2,808,519, nor is there any prospect of such payment. This amount, if received, will be recuperated from the remedy sought" against the United States in *Case B61*. J.A.76 n.2.[9] In response, see Rebuttal of the United States to Claimant's Reply, *Case B61*, Statement No. 16 (Cubic Corporation), at 24 & n.32 (Sept. 1, 2003); App. 30a, the U.S. Agent noted that

> Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent letters to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the

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[9] The court of appeals observation notwithstanding, see Pet. App. 12-13, this filing by Iran was not a "concession" that the ICC award was not "at issue" in *Case B61*. Rather, it was an acknowledgment of the Tribunal's analytically distinct heads of jurisdiction, and the effect of the Tribunal's earlier ruling in *Case B66*.

> ICC Award it would "be recouped from the remedy sought against the United States in Case B61." Letter from M.H. Zahedin-Labba[f], Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999).

App. 31a & n.32. A loss or victory in the enforcement action between Cubic and MOD would enlarge or diminish, respectively, Iran's claim against the United States at the Claims Tribunal in *Case B61*.

That the Cubic judgment is "at issue" in *Case B61* is further supported by the jurisdictional structure of the Claims Tribunal, as confirmed in its previous rulings, which should be accorded a "respectful consideration" by this Court and consonant with the United States' obligations under the Algiers Accords. Additionally, the international law of recoupments and set-offs in litigation before international tribunals confirms this result. Finally, such a holding is consistent with this Court's precedents vindicating the foreign policy interests of the United States in managing litigation before international forums.

1. The Ninth Circuit's holding that because *Case B61* did not involve Cubic as a party, the Cubic judgment could not be "at issue" before the Tribunal, see Pet. App. 12-14, profoundly misapprehends the Tribunal's jurisdiction under the Algiers Accords and ignores the Tribunal's own rulings as to the interplay of its jurisdiction and the Cubic matter. As already noted, see *supra* at 3-6, the Tribunal has jurisdiction under the Algiers Accords CSD over certain claims of

private parties against Iran or the U.S. (as the case may be). See CSD, art. II(1); App. 20a. But the Tribunal has ruled that it has no jurisdiction over the claims of Iran against U.S. na tionals (or the U.S. against Iranian nationals), except by way of counterclaim. See *Case A2*, DEC1-A2-FT (Jan. 26, 1982), 1 Iran-U.S. C.T.R. 101 (1982); see also George H. Aldrich, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 488-89 (1996); Charles N. Brower & Jason D. Brueschke, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 96-98 (1998); Moshen Mohebi, THE INTERNATIONAL LAW CHARACTER OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 82-85 (1999).

The Tribunal consequently dismissed MOD's direct claim against Cubic in *Case B66* for lack of jurisdiction, see App. 28a (¶11), and, indeed, that is the reason petitioner later sought recourse before the International Chamber of Commerce. The Tribunal also dismissed MOD's direct claim against the United States because of a lack of contractual privity between Cubic and the U.S. government, another jurisdictional requisite for official claims. See App. 27-28a (¶9). Nevertheless, the Tribunal held in its award in *Case B66* that Iran's claim against the United States for breach of the Algiers Accords' obligation to ensure the "mobility and free transfer of Iranian assets within [U.S.] juris diction," Algiers Accords, General Decl., Principle A, App. 15a, *was* within the Tribunal's jurisdiction and *was* actually being litigated by Iran in *Case B61*. See App. 26-27a (¶4), 28a (¶10) ("insofar as the claim in Case No. B61 raised issues concerning the interpretation or performance of Contract No. 134 [the Cubic contracts] pursuant to the General Declaration.

. . . The Tribunal's dismissal of the claim against the United States in the present Case is without prejudice to any findings it may make concerning Contract No. 134 in Case No. B61."); see also *Islamic Republic of Iran v. United States*, Partial AWD 529-A15-FT (May 6, 1992), 28 Iran-U.S. C.T.R. 112 (1992) (holding that Iran's claims for U.S. breach of Algiers Accords in respect to non-military equipment was within the Tribunal's jurisdiction and granting partial relief to Iran). See ALDRICH, *supra*, at 505-10; BROWER, *supra*, at 278-80, 474-76.

a. The Claims Tribunal has thus held that the United States' obligations under the Algiers Accords in regard to the Cubic judgment are "at issue" and now pending before the Tribunal. The court should construe the "at issue" caveat consistent with the Claims Tribunal's own governing precedents. In interpreting U.S. international obligations, this Court gives "respectful consideration to the interpretation of an international [agreement] rendered by an international [tribunal] with jurisdiction to interpret [the agreement]." *Medellín v. Texas*, 128 S.Ct. 1346, 1361 n.9 (2008) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

Although petitioner is mindful that such a consideration cannot trump the plain meaning of a treaty, see *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) ("Even according such ['respectful consideration'], the ICJ's interpretation cannot overcome the plain import of Article 36" of the Vienna Convention on Consular Relations), here the "plain import" of the TRIA's relinquishment provision (in light

of the jurisdictional provisions of the Algiers Accords CSD) is in accord with the Claims Tribunal's own interpretation. Whether or not this Court would care to support a particularly robust form of the "respectful consideration" canon for all treaty interpretation cases, see *Sanchez-Llamas*, 548 U.S. at 365, 382-86 (Breyer, J., joined by Stevens & Souter, JJ., dissenting), is really of no moment here. It is manifest that *Case B61* is within the Tribunal's jurisdiction, and that the Tribunal itself (at the instance of both the U.S. and Iran) has acknowledged that United States' obligations under the Algiers Accords are inextricably linked to the ultimate disposition of the Cubic judgment.

b. There is an even greater point of principle at stake here than according a decent respect to the Tribunal's decisions concerning the effect of its jurisdiction on the Cubic judgment. As a matter of statutory construction (as distinct from the exercise of interpreting the Algiers Accords), the TRIA's "at issue" proviso should be read consistent with the United States' treaty obligations.

From this Court's earliest years, a consistent canon of construction has been that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." *Murray v. The CHARMING BETSY*, 6 U.S. (2 Cranch) 64, 118 (1804). This Court has thus "indulged" the "presumption" that Congress intends its enactments to be consistent with the United States' treaty obligations. *Chew Heong v. United States*, 112 U.S. 536, 550 (1884); see also *MacLeod v. United States*, 229 U.S. 416, 434 (1913) (construing a statute "in the light of the purpose

of the government to act within the limitation of the principles of international law" because "it should not be assumed t hat Congress proposed to violate the obligations of the country to other nations."). *The CHARMING BETSY* canon has been extended by this Court, see *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), to ensure consistency between a statute and a sole executive agreement (such as the Algiers Accords; see *Dames & Moore*, 453 U.S. at 660, 679-86) concluded under the authority of the president. See also *Puget Sound Agricultural Co.*, 13 U.S. Op. Att'y Gen. 503 (1871) ("If this proviso [in an act of Congress requiring a deduction from an international arbitral award in favor of Great Britain] is to cause the payment of a less sum than the amount awarded, it will produce a breach of the treaty, and make th[is] country responsible to the foreign power for such a breach. A statute which may have such consequences should receive the strictest construction allowable under established rules.").

The CHARMING BETSY canon has been reaffirmed in recent opinions of this Court. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."). Whether viewed as a presumption as to congressional intent, a rule against inadvertent repeal, or a vindication of comity, the canon's principle objective is to ensure the integrity of United States' obligations under international agreements.

Were TRIA and VTVPA's "at issue" caveat to be

construed at variance with the Algiers Accords' jurisdictional provisions in the CSD, as reflected in the court of appeals' ruling, extraordinary mischief could ensue as to both the competence of the Tribunal to render its awards in pending cases and the enforcement of those rulings. See General Decl. ¶17, App. 19a; CSD art. IV(3), App. 22a. Such a result could easily be avoided by giving the "at issue" caveat a sensibly broad ambit.

2. Based on the representations of both Iran and the United States, any award that Iran would receive from the Tribunal (based on Iran's claim that the U.S. breached its Algiers Accords obligation to allow the free transfer of Iranian assets in the United States) would have to be recouped or set-off by any amounts that Iran would have received from Cubic, via the enforcement of the ICC's award in MOD's favor. See App. 30-32a; J.A.76 n.2. The TRIA's "at issue" caveat should thus be construed consistent with international law's definition of a dispute as encompassing counterclaims, set-offs, and recoupments.

Insofar as the accepted definition of a dispute in international jurisprudence is "a disagreement on a point of law or fact, a conflict of legal views or interests between the parties," *East Timor* (Port. v. Austrl.), 1995 I.C.J. 90, 99 (June 30) (¶22) (collecting earlier ICJ and PCIJ judgments), it is no surprise that international tribunals have recognized set-offs of claims as against sovereign parties in litigation. See, e.g., *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herz. v. Serb.), 1997 I.C.J. 243, 282-

83 (Dec. 17) (Order on Counterclaims) (sep. op. of Lauterpacht, J.) (citing *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356 (1955)).[10] Allowance of set-offs has been a consistent part of international claims practice for nearly two centuries. See 1 Marjorie M. Whiteman, DAMAGES IN INTERNATIONAL LAW 248-74 (1937); see also *Norwegian Shipowners' Claims* (Nor. v. U.S.), Hague Ct. Rep. (Scott 2d ser.) 39, 78-80 (Perm. Ct. Arb. 1922) (Page Bros. claim) (allowing a set-off on facts similar to those here).

This Court has consistently ruled, both as a matter of federal common law and (later) in construing the FSIA, that a foreign sovereign who initiates litigation in this country may expect to be subject to counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state," 28 U.S.C. § 1607(b), or a set-off for amounts due. See *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 613, 631 (1983); *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (act of state doctrine no bar to consideration of counterclaims or set-offs); *National City Bank*, 348 U.S. at 365 ("the ultimate thrust of the

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[10] International tribunals have recognized, consistent with this Court's own formulation, that while a counterclaim seeks affirmative relief, a set-off or recoupment reduces the recovery to a prevailing party. See *National City Bank*, 348 U.S. at 357-58 & n.2. A recoupment is a "[r]eduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction." BLACK'S LAW DICTIONARY (8th ed. 2004).

consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation."). As a matter of symmetry, a sovereign is entitled (in either inter-State disputes or those involving private claimants) to set-off amounts owed to it arising from the same transactions or occurrences.

Set-offs of claims have, even more pertinently, been prominent in matters before the Claims Tribunal. Under the Algiers Accords, only awards against Iran would be eligible for automatic payment from the Security Account constituted from Iranian funds originally frozen by the United States. See General Decl. ¶7; App. 16-17a. In cases where Iran won awards before the Tribunal from American private claimants (by way of counterclaim or set-off), Iran has been obliged to seek enforcement of those awards in U.S. courts under the New York Convention. See, e.g., *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992); *Ministry of Defense of Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992), cert. denied, 494 U.S. 1016 (1990); see also MOHEBI, *supra*, at 266-72.

In the Tribunal's past awards, set-offs have been permitted, just as they would be with respect to Iran's recovery of the Cubic judgment. See Iran-U.S. Cl. Trib. R. 18(1), 19(3) ("the respondent may make a counterclaim or rely on a claim for the purpose of a set-off, if such counterclaim or set-off is allowed under the Claims Settlement Declaration."), 19(4), available at http://www.iusct.org/index-english.html; *Islamic Republic of Iran v. United States*, ITL AWD 83-B1-FT,

¶¶76-142 (Sept. 9, 2004), Westlaw Iran Award ITL 83-B1-FT; *Computer Sciences Corp. v. Islamic Republic of Iran*, AWD 221-65-1, at 51-53 (Apr. 16, 1986), 10 Iran-U.S. C.T.R. 269, 309 (1986) ("claims for set-off are generally governed by the same standards as counterclaims. The concept of set-off necessarily presupposes the existence of a claim that can be used for such set-off."). The Tribunal has allowed set-offs of amounts derived from collateral proceedings, even absent privity of contract with the sovereign seeking an adjustment, and even so far as with respect to different causes of action. See *Futura Trading Inc. v. Islamic Republic of Iran*, AWD 263-324-3, ¶62 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99, 116 (1986). There seems no doubt, therefore, that since funds due to Iran from the Cubic ICC award would be necessarily deducted (by way of set-off or recoupment) from any judgment that Iran receives from the United States in *Case B61*, the Cubic judgment is "at issue" before the Tribunal.

3. This Court has recognized the imperative public importance of maintaining U.S. adherence to the Algiers Accords. See *Dames & Moore*, 453 U.S. at 660 (1981) (explaining that certiorari before judgment – granted under Supreme Court Rule 11 only when the matter is of "imperative public importance" – was necessary because inaction would allow Iran to "consider the United States to be in breach of the Executive Agreement."). "[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries." *Dames & Moore*, 453 U.S. at 679. It is well-settled that the "the congressional purpose in authorizing blocking orders is 'to put control of foreign assets in the hands of

the President. . . .'" *Id.* at 673 (quoting *Propper v. Clark*, 337 U.S. 472, 493 (1949)). The goal of a "unified national policy in the administration of the [Trading with the Enemy] Act," *Propper*, 337 U.S. at 493, requires Executive management of the complex diplomatic efforts relating to disputed assets because those assets "serve as a 'bargaining chip' to be used by the President. . . ." *Dames & Moore*, 453 U.S. at 673. As in *Dames & Moore*, "it is difficult to accept [respondent's] argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments, garnishments, or similar encumbrances on property." Id. Congressional passage of the VTVPA's and TRIA's relinquishment provision was animated by precisely the same concerns. See VTVPA §§ 2002(c) & (d); App. 4-5a.

The foreign policy interests of the United States in managing cases before international tribunals warrant judicial deference to the interpretations of the Executive Branch. Article II of the Constitution provides the President with the "'vast share of responsibility for the conduct of our foreign relations'." *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952)) (Frankfurter, J., concurring)). Accordingly, the President has "plainly compelling" "interests" in ensuring the reciprocal observance of international agreements such as the Algiers Accords, protecting relations with Iran, and demonstrating commitment to the rule of international

law. See *Medellín*, 128 S. Ct. at 1367 (2008).[11]

Because presidential power to manage and resolve claims is "integrally connected with normalizing United States' relations with a foreign state," *Dames & Moore*, 453 U.S. at 683 (citing *United States v. Pink*, 315 U.S. 203, 229-30 (1942)),[12] this

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[11] Although this Court in *Medellín* held that, despite these interests, the President lacks authority to establish binding rules of decision that preempt contrary state law, see 128 S. Ct. at 1368-71, the Court expressly acknowledged that the President has power to comply with international agreements through other means. See id. at 1371. In this case, the President undoubtedly had constitutional authority to comply with the Algiers Accords by unblocking Iranian assets and undoubtedly maintains constitutional authority to represent the U.S. before the Claims Tribunal.

[12] In *United States v. Pink*, the Court stated:

> Power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." Effectiveness in handling the delicate problems of foreign relations requires no less. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised.

315 U.S. at 229-30 (internal citations omitted). See also *Dames & Moore*, 453 U.S. at 683 ("The continued mutual

Court should defer to the Executive's interpretation of the relevant statutory language of TRIA and VTVPA. See, e.g., *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy of deference to the President in matters of foreign affairs"). This Court has "not only recognized the limits of [its] own capacity to 'determin[e] precisely when foreign nations will be offended by particular acts,' but consistently acknowledged that the 'nuances' of 'the foreign policy of the United States are much more the province of the Executive Branch and Congress than of this Court'." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (citing *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194, 196 (1983), and *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327 (1994)). While deference to the foreign policy expertise of the Executive is not unlimited, it is particularly appropriate here because Congress has taken no action rejecting either the Executive Branch's statutory interpretation of TRIA's "at issue" caveat or its assertions that respondent's position will result in the embarrassment of U.S. foreign policy and its litigation position at the Claims Tribunal.

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amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.") (quoting *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) (Learned Hand, J.)).

II. THE CUBIC JUDGMENT IS NOT A "BLOCKED ASSET" UNDER TRIA.

Only if this Court concludes that respondent has not relinquished his right to attach, need it address the status of the Cubic judgment as a "blocked asset" under TRIA section 201(d)(2)(A), which defines that term for property subject to attachment or execution as: "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." TRIA § 201(d)(2)(A); App. 12a.

At the time the court of appeals rendered the decision for which review was sought here, the Cubic judgment was not a "blocked asset," and its decision to the contrary was error. To the extent that the October 25, 2007, designation by the Secretary of State of the Iranian Ministry of Defense and Armed Forces Logistics (MODAFL) as having engaged in activities relating to the proliferation of weapons of mass destruction, 72 Fed. Reg. 71,991 (Oct. 25, 2007), has any bearing on the status of the Cubic judgment as a "blocked asset," such an issue is not properly before the Court at this time.

A. The Cubic Judgment Was Neither "Seized" nor "Frozen" at the Time of the Decision Under Review Here.

The Ninth Circuit ruled, Pet. App. 15-20, that the Cubic judgment was a "blocked asset" within the meaning of TRIA sections 201(a) and 201(d)(2)(A). The same panel reached precisely the opposite conclusion in its earlier ruling, see 385 F.3d at 1216, Pet. App. 55; id.

at 1224, Pet. App. 76 (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)), when it appeared that such would support a holding *against* Iran's immunity from attachment under the FSIA. When this Court vacated the panel's earlier holding on FSIA grounds, the panel reversed course and held that the Cubic judgment is a "blocked asset" under the TRIA.

The Ninth Circuit's earlier holding was correct, based on a reading of the statute and the facts of this case at the time of decision. As MOD's interest in the Cubic judgment could have only arisen at the time of the district court's 1998 confirmation of the ICC award, the Cubic judgment was neither "seized" nor "frozen," under then-existing regulations. The ostensibly military character of the asset does not change this result. Finally, applying a narrow construction to the "blocked asset" language of TRIA is consistent with the Algiers Accords and the United States' other treaty obligations to Iran, and any holding that the Cubic judgment is "blocked" would place the U.S. in default of significant international obligations, carrying heavy consequences for the U.S. litigation position at the Claims Tribunal.

1. The Ninth Circuit's holding turns on the technical language of section 201 of TRIA. By its own terms, TRIA applies only to the "blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party). . . ." TRIA, § 201(a); App. 6a. The phrase "blocked asset," is, however, given a very specific definition under TRIA, including "any asset seized or frozen by the United States under. . . sections 202 and 203 of the

International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." TRIA, § 201(d)(2)(A); App. 12a. Blocked assets also include "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C.App. 5(b))." Id.

a. Contrary to the Ninth Circuit's most recent holding, the Cubic judgment is "regulated," not "blocked," within the meaning of TRIA section 201(a) because it has neither been "seized" nor "frozen" by the United States. See TRIA, § 201(d)(2)(A); App. 12a. The Cubic judgment is subject to the general license of 31 C.F.R.§ 535.579(a), which provides:

> Transactions involving property in which Iran or an Iranian entity has an interest are authorized where: (1) The property comes within the jurisdiction of the United States or into the control or possession of any person subject to the jurisdiction of the United States after January 19, 1981, or (2) The interest in the property of Iran or an Iranian entity (e.g. exports consigned to Iran or an Iranian entity) arises after January 19, 1981.

Id.; see also *Regan v. Wald*, 468 U.S. 222, 234 (1984) (discussing general licenses with Cuba); *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) ("assets blocked pursuant to Executive Order 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979), and its accompanying regulations, see 31 C.F.R. Part 535, that are also subject to the general license of 31 C.F.R. § 535.579, are not blocked assets under the TRIA and therefore

are not subject to attachment under that statute."). Moreover, as a judgment, the proceeds of MOD's arbitration award against Cubic that has now been confirmed, are treated as a distinct form of property. See 31 C.F.R 535.311. Indeed, the Ninth Circuit said as much in its earlier ruling. See Pet. App. 53 ("The combination of these regulations makes clear that the Cubic judgment is properly regulated by the [Iranian Assets Control Regulations]. . . .").

In order to avoid this result, the Ninth Circuit held, see Pet. App. 20, that Iran's interest in the property arose in October 1977, when Iran executed the underlying contracts with Cubic, or, at the latest, in October 1978, when Ir an made a payment on the contracts. This ruling flatly contradicts the panel's prior opinion. See 385 F.3d at 1216, Pet. App. 55 ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree."); id. at 1224, Pet. App. 76 ("MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic. *MOD v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168 (S.D. Cal. 1998).").

The property being attached here is *not* the military equipment (the air combat maneuvering range) that was the subject of the underlying transaction between Cubic and MOD; rather, it is MOD's judgment against Cubic, which confirmed an arbitration award for breach of contract. Iran never sought specific performance in its ICC arbitration with Cubic. See J.A.45 (¶11.28); see also ICC Award ¶6.1

(summarizing Iran's submissions). The ICC arbitration panel acknowledged in its award that the ACMR that MOD had bought and paid for had already been re-configured and re-sold to Canada. J.A.38-39 (¶2.3), 45-47. Indeed, the ICC panel took care to calculate the salvage value of the ACMR as an element of MOD's recovery. J.A.47 (¶18.1). This is consistent with the position of Iran before the Claims Tribunal in *Case B61* that "the market price of the equipment [the ACMR] constitut[es] Iran's remedy in the main. . . ." J.A.73 (¶3). See also U.S. Pet. Amicus Br. 11-13.

MOD could not have had any interest in the Cubic judgment, until such time as a U.S. court had recognized as enforc eable an international arbitral award granting it a right of action to collect the award. See J.A.68. Any attempt to "back-date" Iran's potential interest in the Cubic judgment, to a time prior to January 1981, should be unavailing. To characterize the Cubic judgment as having actually arisen in 1977 or 1978 ignores that IEEPA's statutory and regulatory scheme requires (at a minimum) some sort of possessory interest by a sanctioned entity in the relevant property. See *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003) ("[t]o seize or freeze assets [under IEEPA] transfers possessory interest in the property."). No such transfer could have occurred here in relation to MOD's interest in the ACMR or the Cubic judgment. Cubic has never made any payment to MOD, in compliance with the arbitral award. The Ninth Circuit has thus given an extraordinarily broad ambit to the definition of "blocked assets" under the TRIA, despite that statute's narrow definition, and a number of countervailing

considerations.

b. If this Court were to find that petitioner's interest in the Cubic judgment arose after January 19, 1981 (the date of the Algiers Accords), that would be the end of the matter. The Cubic judgment was subject to the general license of 31 C.F.R.§ 535.579(a), and so was neither "seized" nor "frozen," and cannot definitionally be a "blocked asset" under the TRIA.

But even if the Ninth Circuit's factual supposition is true (that Iran's interest in the Cubic judgment somehow arose prior to January 1981), the Algiers Accords and presidential determinations thereafter, had the effect of unblocking most Iranian assets in this country. See *Rubin v. Islamic Republic of Iran*, 2007 WL 1169701, at *4 (N.D. Ill. Apr. 17, 2007); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63, 67 (E.D.N.Y. 2004). Assets blocked by Executive Order [EO] 12170, were later unblocked by EOs 12281, 12282, and 1283. See, e.g., 31 C.F.R.§ 535.215 ("all persons subject to the jurisdiction of the United States in possession or control of properties. . . are licensed, authorized, directed and compelled to transfer such properties held on January 18, 1981 as directed after that day by the Government of Iran, acting through its authorized agent."). See also U.S. Pet. Amicus Br. 13-14.

In other words, even if Cubic had been deemed to have been in possession of any Iranian interest in the ACMR, as of the date of the Algiers Accords, such could have been transferred to Iran. Indeed, such was the United States' obligation under the Algiers Accords General Declaration. See App. 15a (¶A), 18a (¶9). If

the Ninth Circuit's decision to the contrary is left undisturbed, it would mean that all interests which Iran had in the United States as of November 14, 1979, have remained blocked, placing the United States in manifest violation of the Algiers Accords, and subject to remedial proceedings at the Iran-U.S. Claims Tribunal. See App. 19a (¶17).

c. That leaves the court of appeals' suggestion, as contained in its amended opinion after denial of rehearing, Pet. App. 19, that Iran's interest in the ACMR remained blocked even in the wake of the Algiers Accords. Once again, this presumes (as it must) that the relevant "property" or "blocked asset" here, TRIA § 201(a); App. 6a, is Iran's interest in the ACMR, and not the enforcement of the ICC award granting contractual remedies to MOD. In any event, the Ninth Circuit's reliance on a supposed "military goods" exception, Pet. App. 19, to the United States' obligations under the Algiers Accords is not supported by the relevant statutory and regulatory authority.[13]

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[13] Petitioner has been entirely consistent concerning the legal character of the Cubic judgment. MOD did previously argue that it qualified as a military asset under the FSIA, see 28 U.S.C. § 1611(b)(2) ("property is, or is intended to be, used in connection with a military activity and . . . is of a military character . . ."). That is an entirely different inquiry from whether MOD had a possessory interest in the judgment such as to trigger a blocking order prior to January 19, 1981, or whether it had been otherwise "froz[en] or "seiz[ed]" within the meaning of the TRIA. In any event, when MOD indicated in prior proceedings before the Ninth Circuit that "[t]he property at issue here is a

See also U.S. Pet. Amicus Br. 13-15.

As a matter of straightforward textual analysis, the Arms Export Control Act (AECA), 22 U.S.C. § 2751 et seq., relied upon below, cannot be relevant to the "blocked asset" analysis under TRIA. The reason is that TRIA section 201(d)(2)(A) textually limits its scope to a "seiz[ure]" or "fr[eezing]" under the authority of the Trading with the Enemy Act (TWEA), 50 U.S.C. App. § 5(b), or the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701 & 1702. TRIA neither cites nor cross-references AECA. Even more pertinently, any sanction under AECA would be a "regulation" of the relevant property, and not a "seiz[ure]" or "fr[eezing]" within TRIA's limited ambit.

2. As with the TRIA's "at issue" caveat, the proper construction of the TRIA's definition of "blocked asset" can be resolved by straightforward textual and structural analysis. It is manifest that by virtue of fashioning a purpose-built definition of "blocked asset" in TRIA section 201(d), App. 12a, and limiting the statutory scope of "seiz[ures]" and "fr[eezings]" to those allowed under specified sections of TWEA and IEEPA, Congress intended a narrow ambit to "blocked asset[s]"

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liquidation to a monetary amount of a military asset manufactured by Cubic and owned by MOD," J.A.88, it merely confirms petitioner's contention here that the relevant "property" is the Cubic judgment (reflecting an arbitral award for contractual breach claims) and not the ACMR.

eligible for execution against under TRIA.[14]

But even if there should be any textual doubt on the TRIA's narrow definition of "blocked asset," such should be resolved conformably with the United States' obligations under the Algiers Accords and other international agreements with Iran. As already discussed, the Algiers Accords imposed an obligation on the United States to "ensure the mobility and free transfer of all Iranian assets within its jurisdiction," App. 15a (General Decl., ¶A), and that the "United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979,[15] for the transfer to Iran of all Iranian properties which are located in the United States and abroad. . . ." App. 18a (General Decl., ¶9). Any application of TRIA that would result in a holding that the Cubic judgment is a "blocked asset" and subject to attachment, and thus may not be remitted to Iran, would facially violate

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[14] TRIA provided additional exclusions, not otherwise implicated here, of property ineligible for "blocked asset" treatment. See TRIA § 201(d)(2)(B); App. 12-13a.

[15] Part of the applicable U.S. law subsisting prior to November 14, 1979, was the United States' obligations under the Treaty of Amity, Economic Relations and Consular Rights, Iran-U.S., Aug. 15, 1955, art. IV(1), T.I.A.S. No. 3853, 8 U.S.T. 899 ("Each High Contracting Party shall. . . refrain from applying unreasonable or discriminatory means that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.").

these treaty commitments. This would especially be the case in conjunction with a predicate finding that Iran's interest in the Cubic judgment arose prior to the Algiers Accords.[16] Such a ruling emanating from this Court would essentially amount to a judicial declaration that the U.S. was in treaty default not only in regards the Cubic judgment, but a whole host of assets "at issue" in *Cases B1, B61* and *A15* before the Claims Tribunal. It is not the place of petitioner to opine further in this filing on the consequences of such an occurrence.

Happily, this Court need never reach such a cross-roads because *The CHARMING BETSY* canon, discussed, *supra*, at 36-37, provides the measure of judicial calculus in assessing a construction of a statute that would result in a "violat[ion of] the law of nations." 6 U.S. (2 Cranch) at 118. Indeed, the grounds for applying *The CHARMING BETSY* canon to TRIA's "blocked asset" language may be even more compelling than for the "at issue" caveat.[17] At stake with the scope

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[16] Insofar as TRIA was enacted four years after the district court's confirmation of the ICC award, the terms of the Algiers Accords and 1955 Treaty of Amity would counsel that TRIA not be applied retroactively to "impair [MOD's] legally acquired rights and interests" in the Cubic judgment. See *Landsgraf v. USI Film Prods.*, 511 U.S. 224, 243-47, 271-72 (1994); *United States v. The Schooner PEGGY*, 5 U.S. (1 Cranch) 103, 110 (1801).

[17] Nor is there any contradiction that petitioner, employing *The CHARMING BETSY* canon, seeks a broadening construction of TRIA's "at issue" caveat, while

of the "blocked asset" definition is a central set of commitments under the Algiers Accords: the United States' duty to release Iranian assets that had been subject to seizure and blockage as of November 14, 1979, and afterwards in response to the crisis in relations between the two nations. To allow private parties, such as respondent, to further distrain those properties, in violation of the clear terms of the Algiers Accords, is a result that should be avoided "if any other possible construction remains." Id.

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submitting that TRIA's definition of "blocked assets" should be narrowly construed. It is the nature of the international obligation affected by the potential reading of the statute that matters, and not the direction of the interpretive ratchet. If a broad reading of a statute would result in a violation of an international obligation, *The CHARMING BETSY* canon would counsel a narrowing corrective, and vice versa.

This is all consistent with the canon of treaty interpretation that U.S. obligations under international agreements should be construed liberally and in good faith. See *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (a treaty "should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. . . .[They] should be interpreted in that broad and liberal spirit. . . ."); *Geofroy v. Riggs*, 133 U.S. 258, 271-72 (1890). ("[i]t is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. . . .[W]here a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.").

B. As the Effect of the October 2007 Designation was Never Passed Upon by Lower Courts, it Should Not be Addressed Here in the First Instance.

The October 25, 2007, designation by the Secretary of State, under Executive Order 13382, of the Iranian Ministry of Defense and Armed Forces Logistics (MODAFL) as a suspected proliferator of weapons of mass destruction, 72 Fed. Reg. 71,991 (Oct. 25, 2007), occurred over three months after the issuance of the Ninth Circuit's amended opinion, see Pet. App. 1, and just days prior to the filing of the writ of certiorari. No lower court has had the opportunity to pass on the effect of the Secretary of State's October 2007 designation on the status of the Cubic judgment as a "blocked asset" under TRIA. Substantial fact issues would need to be resolved as to this matter, not the least of which is whether MODAFL is actually the same entity as petitioner.

Because the State Department's October 2007 designation of petitioner post-dates the court of appeals' judgment, prohibiting the lower court's ability to address the issue, and because "ordinarily, this Court does not decide questions not raised or resolved in the lower court," *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam), this Court should vacate the judgment of the lower court and remand for further consideration in light of the recent designation only if that issue would be dispositive. As this Court has stated, "[t]his Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below

are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); see also *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam).

While these exceptional circumstances have included intervening events, this Court has addressed the issue only to the extent of vacating the judgment below and remanding the case for further proceedings. *Youakim*, 425 U.S. at 234. In *Youakim*, this Court reasoned that since "[n]either the appellants nor the District Court had the benefit of either of these developments [including the issuance of a state program guidance] when the case was in the lower court. . . it is appropriate to afford them the opportunity to do so, but that the claim should be aired first in the District Court." Id. at 235-36. Thus, this Court vacated the judgment of the lower court and remanded the case to that court for further proceedings in light of the intervening events. Id. at 237; see also *Thorpe v. Housing Authority*, 386 U.S. 670, 673 (1967) (per curiam) (remanding for reconsideration in light of supervening administrative directive issued by federal authorities).

Since *Youakim*, this Court has consistently viewed intervening developments as "exceptional circumstances" to be considered, but only insofar as this Court has exercised its power to grant certiorari, vacate the judgment below, and remand the case (GVR) for reconsideration. See *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam) (Stevens, J., concurring; Rehnquist, C.J., concurring in part and dissenting in part; Scalia & Thomas, JJ., dissenting). In *Lawrence*, a child was denied social security benefits for failure to

meet state procedural requirements on proof of paternity. Id. at 164-65. In his response to the petition for certiorari, the Solicitor General noted a new interpretation of the Social Security Act issued by its administration, and thus recommended that this Court issue a GVR order so that the case may be considered in light of the new statutory interpretation. Id. at 165. This Court observed that it has

> GVR'd in light of a wide range of developments, including [its] own decisions. . . new federal statutes. . . administrative reinterpretations of federal statutes. . . . changed factual circumstances. . . and confessions of error or other positions newly taken by the Solicitor General. . . . [A GVR order is appropriate] [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Id. at 165-67. Moreover, when this Court is "uncertain, without undertaking plenary analysis, of the legal impact of a new development, especially. . . one which the lower court has had no opportunity to consider," a GVR order is appropriate. Id. at 174. Therefore, in

light of the intervening statutory interpretation, the *Lawrence* Court granted certiorari, vacated the judgment of the lower court, and remanded the case for further proceedings. Id. at 175.

In accordance with this Court's jurisprudence, and as the Solicitor General correctly recommends, U.S. Pet. Amicus Br. 16-19, if the effect of the State Department's October 2007 designation on the Cubic judgment as a "blocked asset" would somehow "determine the ultimate outcome of [this] litigation," 516 U.S. at 167 – if Elahi is found not to have relinquished his right to attach – the proper disposition of this case would be to vacate the court of appeals' judgment and remand for further proceedings.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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September 5, 2008

Appendix

UNITED STATES PUBLIC LAWS
106th Congress - Second Session
Convening January 24, 2000

PL 106-386 (HR 3244)
October 28, 2000
VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000

An Act To combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, to reauthorize certain Federal programs to prevent violence against women, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 2002. PAYMENT OF CERTAIN ANTI-TERRORISM JUDGMENTS.

(a) PAYMENTS.--

(1) IN GENERAL.--Subject to subsections (b) and (c), the Secretary of the Treasury shall pay each person described in paragraph (2), at the person's election--

(A) 110 percent of compensatory damages awarded by judgment of a court on a claim or claims brought by the person under section 1605(a)(7) of title 28, United

States Code, plus amounts necessary to pay post-judgment interest under section 1961 of such title, and, in the case of a claim or claims against Cuba, amounts awarded as sanctions by judicial order on April 18, 2000 (as corrected on June 2, 2000), subject to final appellate review of that order; or

(B) 100 percent of the compensatory damages awarded by judgment of a court on a claim or claims brought by the person under section 1605(a)(7) of title 28, United States Code, plus amounts necessary to pay post-judgment interest, as provided in section 1961 of such title, and, in the case of a claim or claims against Cuba, amounts awarded as sanctions by judicial order on April 18, 2000 (as corrected June 2, 2000), subject to final appellate review of that order.

Payments under this subsection shall be made promptly upon request.

(2) PERSONS COVERED.--A person described in this paragraph is a person who--

(A)(i) as of July 20, 2000, held a final judgment for a claim or claims brought under section 1605(a)(7) of title 28, United States Code, against Iran or Cuba, or the right to payment of an amount awarded as a judicial sanction with respect to such claim or claims; or (ii) filed a suit under such section 1605(a)(7) on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000;

(B) relinquishes all claims and rights to compensatory damages and amounts awarded as judicial sanctions under such judgments;

(C) in the case of payment under paragraph (1)(A), relinquishes all rights and claims to punitive damages awarded in connection with such claim or claims; and

(D) in the case of payment under paragraph (1)(B), relinquishes all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to section 1610(f)(1)(A) of title 28, United States Code.

(b) FUNDING OF AMOUNTS.--

(1) JUDGMENTS AGAINST CUBA.--For purposes of funding the payments under subsection (a) in the case of judgments and sanctions entered against the Government of Cuba or Cuban entities, the President shall vest and liquidate up to and not exceeding the amount of property of the Government of Cuba and sanctioned entities in the United States or any commonwealth, territory, or possession thereof that has been blocked pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, or regulation issued thereunder. For the purposes of paying amounts for judicial sanctions, payment shall be made from funds or

accounts subject to sanctions as of April 18, 2000, or from blocked assets of the Government of Cuba.

(2) JUDGMENTS AGAINST IRAN.--For purposes of funding payments under subsection (a) in the case of judgments against Iran, the Secretary of the Treasury shall make such payments from amounts paid and liquidated from–

(A) rental proceeds accrued on the date of the enactment of this Act from Iranian diplomatic and consular property located in the United States; and

(B) funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program account within the Foreign Military Sales Fund on the date of the enactment of this Act.

(c) SUBROGATION.--Upon payment under subsection (a) with respect to payments in connection with a Foreign Military Sales Program account, the United States shall be fully subrogated, to the extent of the payments, to all rights of the person paid under that subsection against the debtor foreign state. The President shall pursue these subrogated rights as claims or offsets of the United States in appropriate ways, including any negotiation process which precedes the normalization of relations between the foreign state designated as a state sponsor of terrorism and the United States, except that no funds shall be paid to Iran, or released to Iran, from property blocked under the International Emergency Economic Powers Act or

from the Foreign Military Sales Fund, until such subrogated claims have been dealt with to the satisfaction of the United States.

(d) SENSE OF THE CONGRESS.--It is the sense of the Congress that the President should not normalize relations between the United States and Iran until the claims subrogated have been dealt with to the satisfaction of the United States.

(e) REAFFIRMATION OF AUTHORITY.--Congress reaffirms the President's statutory authority to manage and, where appropriate and consistent with the national interest, vest foreign assets located in the United States for the purposes, among other things, of assisting and, where appropriate, making payments to victims of terrorism.

(f) AMENDMENTS.--

(1) Section 1610(f) of title 28, United States Code, is amended–

(A) in paragraphs (2)(A) and (2)(B)(ii), by striking "shall" each place it appears and inserting "should make every effort to"; and

(B) by adding at the end the following new paragraph:

"(3) WAIVER.--The President may waive any provision of paragraph (1) in the interest of national security.".

* * * * *

UNITED STATES PUBLIC LAWS
107th Congress - Second Session
Convening January, 2002

PL 107-297 (HR 3210)
November 26, 2002
TERRORISM RISK INSURANCE ACT OF 2002

An Act To ensure the continued financial capacity of insurers to provide coverage for risks from terrorism.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL.--Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order

to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER.--

(1) IN GENERAL.--Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.--A waiver under this subsection shall not apply to–

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(c) SPECIAL RULE FOR CASES AGAINST IRAN.--Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106-386;

114 Stat. 1542), as amended by section 686 of Public Law 107-228, is further amended–

(1) in subsection (a)(2)(A)(ii), by striking "July 27, 2000, or January 16, 2002" and inserting "July 27, 2000, any other date before October 28, 2000, or January 16, 2002";

(2) in subsection (b)(2)(B), by inserting after "the date of enactment of this Act" the following: "(less amounts therein as to which the United States has an interest in subrogation pursuant to subsection (c) arising prior to the date of entry of the judgment or judgments to be satisfied in whole or in part hereunder)";

(3) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(4) by inserting after subsection (c) the following new subsection (d):

"(d) DISTRIBUTION OF ACCOUNT BALANCES AND PROCEEDS INADEQUATE TO SATISFY FULL AMOUNT OF COMPENSATORY AWARDS AGAINST IRAN.--

"(1) PRIOR JUDGMENTS.--

"(A) IN GENERAL.--In the event that the Secretary determines that 90 percent of the amounts available to be paid under subsection (b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of the date of the enactment of this

subsection in cases identified in subsection (a)(2)(A) with respect to Iran, the Secretary shall, not later than 60 days after such date, make payment from such amounts available to be paid under subsection (b)(2) to each party to which such a judgment has been issued in an amount equal to a share, calculated under subparagraph (B), of 90 percent of the amounts available to be paid under subsection (b)(2) that have not been subrogated to the United States under this Act as of the date of enactment of this subsection.

"(B) CALCULATION OF PAYMENTS.--The share that is payable to a person under subparagraph (A), including any person issued a final judgment as of the date of enactment of this subsection in a suit filed on a date added by the amendment made by section 686 of Public Law 107-228, shall be equal to the proportion that the amount of unpaid compensatory damages awarded in a final judgment issued to that person bears to the total amount of all unpaid compensatory damages awarded to all persons to whom such judgments have been issued as of the date of enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran.

"(2) SUBSEQUENT JUDGMENT.--

"(A) IN GENERAL.--The Secretary shall pay to any person awarded a final judgment after the date of enactment of this subsection, in the case filed on January 16, 2002, and identified in subsection (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under subparagraph (B), of the balance of

the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraph (1). The Secretary shall make such payment not later than 30 days after such judgment is awarded.

"(B) CALCULATION OF PAYMENTS.--To the extent that funds are available, the amount paid under subparagraph (A) to such person shall be the amount the person would have been paid under paragraph (1) if the person had been awarded the judgment prior to the date of enactment of this subsection.

"(3) ADDITIONAL PAYMENTS.--

"(A) IN GENERAL.--Not later than 30 days after the disbursement of all payments under paragraphs (1) and (2), the Secretary shall make an additional payment to each person who received a payment under paragraph (1) or (2) in an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraphs (1) and (2).

"(B) CALCULATION OF PAYMENTS.--The share payable under subparagraph (A) to each such person shall be equal to the proportion that the amount of compensatory damages awarded that person bears to the total amount of all compensatory damages awarded to all persons who received a payment under paragraph (1) or (2).

"(4) STATUTORY CONSTRUCTION.--Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under this section or under any other provision of law.

"(5) CERTAIN RIGHTS AND CLAIMS NOT RELINQUISHED.--Any person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall not be required to make the election set forth in subsection (a)(2)(B) or, with respect to subsection (a)(2)(D), the election relating to relinquishment of any right to execute or attach property that is subject to section 1610(f)(1)(A) of title 28, United States Code, except that such person shall be required to relinquish rights set forth–

"(A) in subsection (a)(2)(C); and

"(B) in subsection (a)(2)(D) with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

"(6) GUIDELINES FOR ESTABLISHING CLAIMS OF A RIGHT TO PAYMENT.--The Secretary may promulgate reasonable guidelines through which any person claiming a right to payment under this section may inform the Secretary of the basis for such claim, including by submitting a certified copy of the final judgment under which such right is claimed and by providing commercially reasonable payment

instructions. The Secretary shall take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section.".

(d) DEFINITIONS.--In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.--The term "act of terrorism" means–

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.--The term "blocked asset" means–

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that–

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for

which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.--The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.--The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

Algiers Accords

Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Iran-U.S.

General Declaration

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the Resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran,

in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

* * * * *

POINTS II AND III: RETURN OF IRANIAN ASSETS AND SETTLEMENT OF U.S. CLAIMS

* * * * *

Assets in the Federal Reserve Bank

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

Assets in Foreign Branches of U.S. Banks

5. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest

thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

Assets in U.S. Branches of U.S. Banks

6. Commencing with the adherence by Iran and the United States to this Declaration and the Claims Settlement Agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing Security Account specified in that Agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer for return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S.$1 billion. After the U.S.$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the

Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S.$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S.$500 million in the Account. The Account shall be so maintained until the President of the arbitral tribunal established pursuant to the Claims Settlement Agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.

Other Assets in the U.S. and Abroad

8. Commencing with the adherence of Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the conclusion of arrangements for the establishment of the Security Account, with arrangements will be concluded with 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraphs 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

* * * * *

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by

persons other than the United States nationals arising out of the events specified in the preceding sentence.

* * * * *

SETTLEMENT OF DISPUTES

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

Claims Settlement Declaration

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

Article I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this

Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

Article II

1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements

between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Article III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this Agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than $250,000, by the government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

Article IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this Agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

Article V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Article VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an Agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran of the United States.

Article VII

For the purpose of this Agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by

nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

Article VIII

This Agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the Agreement.

THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN,
Claimant,
v.
THE GOVERNMENT OF THE UNITED STATES OF AMERICA, CUBIC CORPORATION,
Respondents.
CASE NO. B66
CHAMBER ONE
AWARD NO. 302-B66-1
Iran - United States Claims Tribunal
Filed April 28, 1987
Signed April 28, 1987

AWARD

I. INTRODUCTION

1. The Claimant, THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN ("MOD") filed a Statement of Claim with the Tribunal on 19 January 1982 against THE GOVERNMENT OF THE UNITED STATES OF AMERICA ("the United States") and CUBIC CORPORATION ("Cubic"). The claim is stated to arise out of two contracts, Nos. 134 and 134A ("the Contracts") entered into on 23 October 1977 between MOD and Cubic for the supply and installation of an air combat system and the parts in connection with that system. MOD alleges that Cubic failed to fulfill its contractual obligations to deliver, ship, install and operate the system. It claims that the United States interfered in the performance of the Contracts by preventing the delivery of certain parts by Cubic, and

that, in so doing, it violated its obligations under the Algiers Declarations. MOD seeks to recover from Cubic US$12,967,876 paid to Cubic in advance payments. It seeks to recover US$15,000,000 in damages against the United States.

2. On 15 September 1982, the United States filed a Statement of Defence together with a request that the claim be dismissed for lack of jurisdiction against both Respondents. The United States argues that pursuant to the Decision of the Full Tribunal in Case No. A2, the Tribunal has no jurisdiction over claims brought by Iran against United States nationals such as Cubic. Further, the United States argues, there was no contractual relationship between it and MOD for the purchase and sale of goods and services so as to give rise to an "official" claim within the meaning of Article II, paragraph 2, of the Claims Settlement Declaration.

3. MOD filed a Reply on 26 September 1983 in which it argued, inter alia, that there existed an "inseparable relation" between the United States and Cubic with regard to the performance of the Contracts, and that this served as a basis for the Tribunal's jurisdiction.

4. The United States filed a Rejoinder on 9 January 1984 in which it maintained its previous arguments. It further contended that the claim against it was duplicative of part of the claim in Case No. B61, another "official" claim filed by MOD against the United States and currently pending before Chamber One of the Tribunal, insofar as the claim in Case No. B61 raised issues concerning the interpretation or

performance of Contract No. 134 pursuant to the General Declaration.

5. Cubic filed a submission on 20 June 1984 in which it stated that, as a wholly privately-owned corporation organised under the laws of the State of California, no claim could be brought against it by an Iranian government entity pursuant to the Decision of the Full Tribunal in Case No. A2.

6. Both MOD and the United States have requested that the Tribunal render an expedited decision on the issues of jurisdiction in this Case on the basis of the documents presently before it.

II. REASONS FOR AWARD

7. The question before the Tribunal is whether it has jurisdiction in the present Case over, first, the United States and, second, Cubic as Respondents.

A. The United States

8. In order for the present claim to qualify as an "official claim," MOD must establish the existence of "contractual arrangements . . . for the purchase and sale of goods and services" within the meaning of Article II, paragraph 2, of the Claims Settlement Declaration. Thus, MOD must satisfy the Tribunal that the United States was bound by a contract with MOD to perform certain obligations under the two Contracts at issue.

9. The Tribunal considers it significant that the United States was not named as a party to either of the Contracts. In the absence of any evidence establishing that the United States had assumed any obligations

under the Contracts, this fact must be regarded as decisive. Thus, the Tribunal concludes that there is no basis in the present Case for an "official" claim against the United States. See The Ministry of National Defence of the Islamic Republic of Iran and Government of the United States of America, Award No. 247-B59/B69-1 (15 August 1986).

10. The Tribunal's dismissal of the claim against the United States in the present Case is without prejudice to any findings it may make concerning Contract No. 134 in Case No. B61.

B. Cubic Corporation

11. It is not disputed that Cubic is a non-governmental corporate entity of United States nationality. In one of its earliest interpretative rulings on the meaning of the Claims Settlement Declaration, the Tribunal held that the General Declaration and Claims Settlement Declaration did not confer jurisdiction over claims by Iran against United States nationals. Case No. A2, Decision No. DEC 1-A2-FT (26 January 1982), reprinted in 1 Iran-U.S. C.T.R. 101. See also Award No. 247-B59/B69-1, supra. There is thus no basis on which the Tribunal can entertain the claim which the MOD seeks to bring against Cubic, a United States national, in the present Case.

III. AWARD

For the foregoing reasons,

i) The claims of THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN against THE GOVERNMENT OF THE UNITED

STATES OF AMERICA and CUBIC CORPORATION are dismissed for lack of jurisdiction.

ii) Each Party shall bear its own costs of the arbitration.

Dated, The Hague, 28 April 1987

Karl-Heinz Bockstiegel
Chairman Chamber One

Mohsen Mostafavi
Concurring

Howard M. Holtzmann

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
The Hague
The Netherlands

Islamic Republic of Iran,
Claimant

v.

United States of America,
Respondent

Case No. B/61
(including Case Nos. A/3, A/8, A/9, and A/14)

Full Tribunal

REBUTTAL OF THE UNITED STATES TO CLAIMANT'S REPLY
Statement No. 16
(Cubic Corporation)

Counsel:
George A. Lehner
Alec Ugol
Mallory A. Stewart

Clifton M. Johnson
Agent of the United States

* * * * *

B. Any Amount of Compensation on This Claim Must be Reduced By the Amounts that Iran Has Already Received For These Items.

Moreover, Iran has failed to deduct any amounts that it has already received as compensation for this

property. The Tribunal's case law requires a claimant to adjust a compensation request to take these factors into consideration. See Common Issues Brief at V.C. Indeed, the Tribunal has specifically recognized the applicability of settlement agreements and collateral decisions, even absent privity of contract with the United States and even as to different causes of action. *See Futura Trading Incorporated v. National Iranian Oil Company*, AWD 262-324-3 at ¶ 62 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99, 116 (1986); *Itel Corporation v. Iran*, AWD 530-490-1 at ¶ 36 (June 8, 1992), 28 Iran-U.S. C.T.R. 159, 174 (1992). If the Tribunal awards Iran any compensation on this claim, it must deduct the amounts that Iran has already been awarded for these Items by the ICC: a total amount of $4,751,069.00 in compensation and interest. Exhibit 22.[32]

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[32] Indeed, Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent letters to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the ICC Award it would "be recouped from the remedy sought against the United States in Case B61." Letter from M.H. Zahedin-Labbar, Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999), included herein as Exhibit 31; *see also* Iran's 1999 Reply: Volume XXI (Doc. 330), Statement 16 at 3 n.2 (stating that any amount received from Cubic "will be recuperated from the remedy sought" in this case).

In sum, if the Tribunal awards Iran any compensation on this claim it would be ordering the United States to place Iran in a superior position than it was in as of November 1979. This is against the principles of the Algiers Declarations. Moreover, any compensation on this claim would unjustly enrich Iran because it would provide Iran with the value of Items which Iran never fully paid for, or obtained title to, and it would also afford double compensation to Iran for claims on which Cubic is already obligated to pay full compensation.

* * * * *

Iran must not be allowed to seek additional compensation from the United States when it is presently enforcing an award against Cubic that covers the very same losses that Iran allegedly suffered.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
NOV 12 2008
OFFICE OF THE CLERK

No. 07-615

IN THE

Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Cubic judgment is "property at issue in claims against the United States before" the Iran-United States Claims Tribunal, which would extinguish respondent's right to attach that judgment because, as a victim of state-sponsored terrorism, he accepted a partial payment under the Victims of Trafficking and Violence Protection Act, as amended by the Terrorism Risk Insurance Act of 2002.

2. Whether the Cubic judgment is a "blocked asset" that is subject to attachment pursuant to the Terrorism Risk Insurance Act of 2002.

PARTIES TO THE PROCEEDINGS BELOW

The parties to this case below are as reflected in the caption. Cubic Defense Systems, Inc., participated as a nominal party, and Stephen M. Flatow was a plaintiff-intervenor in the district court and an appellant in the court of appeals.

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STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA") and the Terrorism Risk Insurance Act of 2002 ("TRIA") are reprinted in the appendix to petitioner's brief ("Pet. Br. App.") at 1a-5a and 6a-13a, respectively.

STATEMENT OF THE CASE

A. The Assassination Of Cyrus Elahi And Dariush Elahi's Resulting Judgment Against Iran.

On October 23, 1990, agents of Iran and specifically the Iranian Ministry of Information and Security ("MOIS") assassinated Cyrus Elahi, a United States citizen, in Paris. *Elahi* v. *Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99, 105 (D.D.C. 2000). Iran had Cyrus Elahi murdered because he had become a vocal and effective advocate for a "free and democratic Iran." *Id.* at 103. When the Iranians shot him, Cyrus Elahi was one of the founders of the Flag of Freedom Organization, a democratic movement that worked closely with the United States government. *Id.* French authorities tried and convicted two Iranian nationals living in Paris of conspiracy to commit terrorist acts, including the assassination of Cyrus Elahi. *Id.* at 105.

Respondent Dariush Elahi, a naturalized United States citizen and administrator of his brother's estate, filed suit against Iran in the United States District Court for the District of Columbia pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. II, § 221(a), 110 Stat. 1214, codified at 28 U.S.C. § 1605 et seq. ("Antiterrorism Act"). The Act modified the Foreign

Sovereign Immunities Act ("FSIA") by authorizing claims against state sponsors of terrorism.[1] Through the Antiterrorism Act, Congress sought to deter terrorist acts and in particular to ensure that U.S. nationals who are "victims of terrorist states be given a United States judicial forum in which to seek redress." *Daliberti* v. *Republic of Iraq*, 97 F. Supp. 2d 38, 50-51 (D.D.C. 2000) (citing *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 12-13, 15 (D.D.C. 1998)).

Since 1984, the State Department has designated Iran as a state sponsor of terrorism. See http://www.state.gov/s/ct/c14151.htm. Iran's direct support of terrorist activities has prompted the United States to suspend diplomatic relations, impose trade restrictions, and participate in the international embargo of the country. See, *e.g.*, Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541; 31 C.F.R. § 596.201 (prohibiting exports and sales to Iran).[2] The United States has concluded that "Iran remain[s] the most significant state sponsor of terrorism." U.S. Dep't of State, *Country Reports on Terrorism 2007*, at 9 (Apr. 2008), *available at* http://www.state.gov/documents/organization/

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[1] Respondent filed suit pursuant to Section 1605(a)(7) of the FSIA. Congress recently replaced this section with an expanded terrorism-related exception. *See* Act of January 28, 2008, Pub. L. No. 110-181, § 1083(a)(1), (b)(1)(A), 122 Stat. 3, 338 (enacting 28 U.S.C. § 1605A).

[2] President Bush recently reaffirmed and renewed sanctions against Iran by issuing a Notice continuing the "national emergency" with respect to Iran "[b]ecause the actions and policies of the Government of Iran continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." 73 Fed. Reg. 13,727 (Mar. 11, 2008).

105904.pdf. In addition, Iran has been "the defendant in the largest number of suits filed" under the terrorism exception to the FSIA. See *Suits Against Terrorist States by Victims of Terrorism*, at 68 (Congressional Research Service, July 31, 2008), *available at* http://www/fas/org/sgp/crs/terror/RL31258.pdf.

Respondent prevailed in his suit against Iran and the MOIS. Neither Iran nor MOIS entered an appearance even though "the Islamic Republic of Iran is an experienced litigant in the United States federal court system." *Elahi*, 124 F. Supp. 2d at 100 n.2. Accordingly, the court entered an order of default. *Id.* at 99-100. The FSIA requires that, before a court may enter a default judgment against a foreign state, the plaintiff must "establish[] his claim or right to relief by evidence satisfactory to the Court." 28 U.S.C. § 1608(e). During a two-day, non-jury trial, respondent presented the testimony of seven witnesses and more than 100 exhibits. The court found that "[i]t stands uncontradicted that the murder of Dr. Elahi was an act of assassination undertaken and directed by agents of defendant MOIS at the behest of defendant Islamic Republic of Iran." 124 F. Supp. 2d at 105.

On December 20, 2000, the district court entered a judgment in favor of respondent against Iran and MOIS, jointly and severally, for $11,740,035 in compensatory damages and against MOIS for $300,000,000 in punitive damages. *Id.* at 115. Neither Iran nor MOIS appealed, and the judgment, which is accruing interest, became final.

B. Respondent's Efforts To Enforce His Judgment Against Iran.

Respondent soon found that obtaining a judgment against Iran could be largely a symbolic victory: he still faced the daunting task of enforcing that judgment against a rogue nation whose limited assets in the United States are subject to significant regulation and to the competing claims of other victims of Iran's terrorism.

Respondent sought to enforce his judgment by seeking to attach a particular Iranian asset that had recently been created within the United States: a federal court judgment that Iran obtained in 1998 against Cubic Defense Systems, Inc., an American defense contractor (the "Cubic judgment"). On May 5, 1997, petitioner had secured an award from the International Chamber of Commerce ("ICC") against Cubic for $2.8 million, based on a contractual arrangement related to the resale to the government of Canada of an arms system that had initially been designed for use by Iran. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Int'l Sales Corp.*, No. 7365/FMS (Int'l Ct. of Arbitration of the Int'l Chamber of Commerce), *reprinted in* 13 Mealey's Int'l Arbitration Report (Oct. 1998) ("ICC Award"); see also JA 35-54. The system sold to Canada was a highly modified version of an air combat maneuvering range ("ACMR") that Cubic in 1977 had originally contracted to build for the Iranian Air Force, prior to the overthrow of the Iranian government and the freezing of arms deliveries to Iran following the 1979 hostage crisis. ICC Award ¶¶ 2.1, 15.5-15.6. In June 1998, petitioner filed to confirm the ICC award in the U.S. District Court for the Southern District of California, JA 21-54, and the court issued its judgment on

December 7, 1998. See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 29 F. Supp. 2d 1168, 1170 (S.D. Cal. 1998), JA 55-68. Cubic's and petitioner's appeals of the district court's order are pending before the Ninth Circuit (No. 99-56380). The Cubic judgment also is accruing interest.

In November 2001, respondent registered his judgment against Iran in the California district court and filed a notice of lien in the amount of his compensatory damages award against any distribution of the Cubic judgment in favor of petitioner. JA 3 (Dkt. 67). When respondent filed his lien, one other judgment creditor, Stephen Flatow, previously had filed a lien against the same Cubic judgment. In addition, two more judgment creditors subsequently filed liens. See Rafii and Rubin Notices of Lien, JA 7 (Dkt. 124, 130).

C. Congressional Enactment Of VTVPA And TRIA And Respondent's Receipt Of Partial Payment Under TRIA.

Recognizing the difficulty that terrorism victims encounter in enforcing the judgments they secure against state sponsors of terrorism such as Iran, Congress created an additional form of compensation in the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541, Pet. Br. App. 1a-5a. The VTVPA established a system for the payment of compensatory damages to certain individuals who had obtained judgments against Iran or Cuba under Section 1605(a)(7) of the FSIA. See *id.* § 2002(a), Pet. Br. App. 1a-3a. The VTVPA initially compen-sated only those who held a final judgment as of July 20, 2000, before entry of respondent's judgment, or who had initiated suit on five specific dates that did not

include respondent's filing date. See *id.* § 2002(a)(2)(A)(i), Pet. Br. App. 2a. The VTVPA thus did not initially cover respondent's claims against Iran.

The VTVPA provided for direct payments to eligible judgment-holders. See *id.* § 2002(b)(2), Pet. Br. App. 4a. With respect to the portion of these payments funded from general funds, the United States is subrogated to "all rights" of these individuals, "to the extent of the payments" it made. See *id.* § 2002(c), Pet. Br. App. 4a.

In addition, eligible judgment holders were required to relinquish certain enforcement rights with respect to their judgments as a condition of receiving payment. Claimants waived the right to collect some or all of their punitive damages awards and waived the right to execute against or attach (1) property at issue in claims against the United States before an international tribunal, (2) property that is the subject of awards rendered by such a tribunal, and (3) property that is subject to 28 U.S.C. § 1610(f)(1)(A), *i.e.*, property subject to regulation under the International Emergency Economic Powers Act ("IEEPA"). VTVPA § 2002(a)(2)(D), Pet. Br. App. 3a.

On November 26, 2002, Congress enacted the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, tit. II, § 201, 116 Stat. 2322, 2337, in a further effort to ensure that American victims of state-sponsored terrorism would receive "some measure of justice." 148 Cong. Rec. S11524, S11527 (daily ed. Nov. 19, 2002) (Statement of Sen. Harkin). TRIA § 201 applies to respondent. As the Conference Report on TRIA explained:

> The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties. It is the intent of the Conferees that Section 201 establish that such judgments are to be enforced.

H.R. Conf. Rep. No. 107-779, at 27 (2002); see also 148 Cong. Rec. at S11528.

TRIA expanded the ability of terrorism victims who secure judgments against state sponsors of terrorism to attach those states' assets. TRIA § 201(a) provides that "[n]otwithstanding any other provision of law," the "blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgments to the extent of any compensatory damages for which such terrorist party has been adjudged liable." See TRIA § 201(a), Pet. Br. App. 6a-7a. The statute defines the term "blocked asset" as "any asset seized or frozen by the United States . . . under sections 202 and 203 of the [IEEPA] (50 U.S.C. §§ 1701, 1702)." *Id.* § 201(d)(2)(A), Pet. Br. App. 12a.

TRIA also amended the VTVPA through a "special rule for cases against Iran" to expand the class of judgment holders against Iran eligible to receive federal compensatory payment. TRIA § 201(c), Pet. Br. App. 7a-8a. TRIA extended eligibility to those who filed suit before October 28, 2000. Respondent filed suit against Iran on October 22, 1999.

When TRIA was enacted, Congress recognized that the funds available would not nearly satisfy the compensatory damages awards of newly eligible

claimants. Through a provision specifically limited to "compensatory awards against Iran," TRIA thus amended the VTVPA to provide for pro rata payments to newly eligible persons. TRIA § 201(c)(4) (adding VTVPA § 2002(d)), Pet. Br. App. 8a-9a. Through a subsection of that provision entitled "[c]ertain claims and rights not relinquished," Congress amended the VTVPA's relinquishment provisions and provided that "[a]ny person receiving less than the full amount of compensatory damages awarded to that party in a judgment [against Iran] . . . shall not be required to make . . . the election relating to relinquishment of any right to execute or attach property" to satisfy the remainder of the compensatory judgment, except "with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards of such tribunal." *Id.* § 201(c)(4) (adding VTVPA § 2002(d)(5)(B)), Pet. Br. App. 11a. This provision is at the center of the dispute in this case.

Additionally, TRIA amended the VTVPA by adding a canon of "statutory construction" that applies specifically to the newly added subsection addressing the partial payments related to judgments secured against Iran, including respondent's: "[n]othing in this subsection shall bar, or require delay in, enforcement of any judgment to which [the VTVPA] applies under any procedure or against assets otherwise available under this section [of the VTVPA] or under any other provision of law." TRIA § 201(c)(4) (new VTVPA § 2002(d)(4) entitled "Statutory Construction"), Pet. Br. App. 11a. To this end, TRIA also directed the Treasury Secretary, in formulating implementing guidelines, to "take all reasonable steps necessary to ensure, to the

maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section." *Id.* § 201(c)(4) (new VTVPA § 2002(d)(6)), Pet. Br. App. 12a; see Dep't of Treasury, Office of Foreign Assets Control, Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran, 68 Fed. Reg. 8077 (Feb. 19, 2003).

In April 2003, respondent applied for VTVPA compensation and late that year received payments for approximately $2.3 million, less than 20% of his outstanding judgment for compensatory damages. To qualify to receive these payments, respondent relinquished his rights to attach or execute upon property that "is at issue in claims against the United States before an international tribunal or . . . is the subject of awards by such tribunal." Pet. Br. App. 11a (quoting 68 Fed. Reg. at 8081).

D. The Algiers Accords And The Limited Jurisdiction Of The Iran-U.S. Claims Tribunal.

Because the phrase "property that is at issue in claims against the United States before an international tribunal," meaning here the Iran-U.S. Claims Tribunal (the "Tribunal"), is central to this case, it is critical to understand the genesis of that Tribunal and the narrow scope of its jurisdiction over claims against the United States.

On January 19, 1981, the United States and Iran signed the Algiers Accords in order to resolve various disputes, including Iran's holding hostage U.S. diplomatic and other personnel. The main commitments of the Algiers Accords were (1) by Iran, to release the American hostages and (2) by the United States, to "restore the financial position of Iran, in so

far as possible, to that which existed prior to November 14, 1979" and to "ensure the mobility and free transfer of all Iranian assets within [U.S.] jurisdiction." Declaration of the Democratic & Popular Republic of Algeria, Algiers Accords of Jan. 19, 1981, General Declaration, 20 I.L.M. 224 (1981) ("General Decl."), General Principles ¶ A, Pet. Br. App. 14a-15a.

To implement the United States' commitments, the President issued a series of Executive Orders that directed the transfer to Iran of various Iranian financial assets. Exec. Order Nos. 12,277-12,280, 46 Fed. Reg. 7915-22 (Jan. 23, 1981). The President also directed that most other Iranian property be transferred to Iran "as directed . . . by the Government of Iran." Exec. Order No. 12,281, 46 Fed. Reg. 7923 (Jan. 23, 1981).

The Algiers Accords also created an international tribunal, the Iran-U.S. Claims Tribunal, to arbitrate certain property disputes and to address disputes over the interpretation or performance of obligations under the Accords. Specifically, the Tribunal has jurisdiction over "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," but not claims of either government against nationals of the other country. Algiers Accords of Jan. 19, 1981, Claims Settlement Declaration, 20 I.L.M. at 230 ("Claims Settlement Decl."), art. II, ¶ 1, Pet. Br. App. 20a. Further, to be within the jurisdiction of the Tribunal a claim or counterclaim must "arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights," and must have been "outstanding on the date of [the Claims Settlement] Agreement [Jan. 19, 1981]." *Id.*;

see also General Decl. ¶ 9, Pet. Br. App. 18a (addressing "Iranian properties which are located in the United States"). The Tribunal also has jurisdiction over claims between Iran and the United States that relate to either an obligation under the Accords or to a contractual agreement between the two governments. Claims Settlement Decl. art. II, ¶¶ 2-3, Pet. Br. App. 20a-21a. These "official" claims, and related counterclaims, also must have been outstanding on January 19, 1981. See *Iran* v. *United States*, Case No. B1, Award No. 83-B1-FT, ¶¶ 137-38 (Iran-U.S. Cl. Trib. Sept. 9, 2004).

Tribunal proceedings are closed to the public. Tribunal pleadings, docket sheets and hearing transcripts are not available to non-parties. Moreover, the United States has taken the position that the public dissemination of Tribunal documents in its possession must be restricted pursuant to the federal statute that authorizes the Secretary of State to maintain the confidentiality of Tribunal filings. See 50 U.S.C. § 1701, note; see *infra* at 34 n.5, 46.

E. Cases B/66 And B/61 In The Tribunal.

The Tribunal proceeding that petitioner asserts as a bar to respondent's attachment of the 1998 Cubic judgment is the B/61 case. The B/66 case is also relevant to petitioner's claim.

The B/66 Case: In January 1982, before petitioner sought arbitration in the ICC, it filed a claim in the Tribunal against Cubic Defense Systems and the United States, denominated B/66, based on the earlier-described contracts for the delivery and installation of the ACMR. See *supra* at 4. In April 1987, the Tribunal determined that it lacked jurisdiction over Iran's claim against Cubic because "the General Declaration and Claims Settlement

Declaration did not confer jurisdiction over claims by Iran against United States nationals." See *Ministry of Nat'l Def. of the Islamic Republic of Iran* v. *United States, Cubic Corp.*, 14 Iran-U.S. Cl. Trib. Rep. 276, 278 (1987) ("*B/66 Decision*"), Pet. Br. App. 28a. The Tribunal also dismissed petitioner's claim against the United States because the United States "was not named as a party to either of the [Cubic] Contracts" and had "assumed [no] obligations under the Contracts." *Id.*, Pet. Br. App. 27a-28a.

The B/61 Case: On January 19, 1982, Iran filed Case B/61 before the Tribunal, solely against the United States regarding certain military properties in the United States as of the date of the Algiers Accords. Those Accords provided for the United States to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which *are* located in the United States." General Decl. ¶ 9 (emphasis added), Pet. Br. App. 18a. Iran claimed that the United States violated Paragraph 9 by barring the transfer to Iran of military equipment produced by numerous military contractors, including the ACMR produced by Cubic. Iran sought a decree requiring the United States to issue export licenses for the military goods or compensation for what Iran had paid and consequential damages. Pet. Br. App. 31a. As President Clinton summarized:

> Case B/61 involves a claim by Iran for compensation with respect to primarily military equipment that Iran alleges it did not receive. Iran had sought to purchase or repair the equipment pursuant to commercial contracts with more than 50 private American companies. Iran alleges that it suffered direct losses and consequential damages in excess of $2 billion in

> total because of the United States Government refusal to allow the export of the equipment after January 19, 1981, in alleged contravention of the Algiers Accords.

Message to the Congress on Iran, May 16, 1996, at http://www.presidency.ucsb.edu/ws/index.php?pid=52818.

Accordingly, the property that is "at issue" in Iran's claim against the United States in the B/61 case includes numerous items of military equipment such as the ACMR that was the subject of petitioner's contract with Cubic. Iran's claim before the Tribunal arising under the Accords does not address the asset that respondent seeks to attach: Iran's 1998 federal court judgment against Cubic. Indeed, as explained below, any dispute concerning that judgment could not fall within the Tribunal's limited jurisdiction. See *infra* at 20-25.

F. Proceedings Below.

When respondent attempted to enforce his FSIA judgment against Iran by attaching the Cubic judgment in the California district court, see *supra* at 4-5, petitioner sought a ruling from the district court that its judgment against Cubic was immune from attachment or execution by respondent and another lienholder. On November 26, 2002, the district court denied petitioner's motion to vacate respondent's lien and upheld the validity of that lien on grounds that are not pertinent here. See Pet. App. 81-106.

The district court also addressed the validity of the lien filed by Stephen Flatow, another judgment holder against Iran who, unlike respondent, received payment under the initial VTVPA payment scheme. Flatow elected to receive payment of 100 percent of his compensatory damages award, and as a conse-

quence, he agreed to the broader relinquishment of rights required under the initial scheme. The district court held that the Cubic judgment was not "at issue in claims against the United States before an international tribunal" and, hence, held that Flatow had not relinquished his attachment rights on this ground. See Pet. App. 90-92. The district court, however, ultimately concluded that Flatow had relinquished his attachment rights because the Cubic judgment is subject to regulation under the IEEPA (a ground not relevant to respondent). *Id.* at 92-97.

Flatow appealed that ruling, and petitioner appealed the district court's ruling denying petitioner's motion to vacate respondent's lien. While this appeal was pending, respondent applied for and received his partial payment. See *supra* at 9.

In October 2004, the Ninth Circuit affirmed the district court's ruling that the Cubic judgment was subject to attachment by respondent, reasoning that the Cubic judgment could be attached pursuant to Section 1610(b)(2) of the FSIA as property of an "agency or instrumentality of a foreign state . . . engaged in commercial activity in the United States." See Pet. App. 65-66. It also affirmed the district court's ruling that Flatow had relinquished his attachment rights because the Cubic judgment is subject to regulation under IEEPA. *Id.* at 48-58.

Petitioner sought review in this Court, which granted certiorari on the limited question whether petitioner constituted an agency or instrumentality of Iran. Finding that the Ninth Circuit had not specifically addressed that question, the Court reversed and remanded for further consideration. *Ministry of Def. & Support for Armed Forces of Iran* v. *Elahi*, 546 U.S. 450, 451-52 (2006) (per curiam).

On remand, the United States appeared as *amicus curiae*. In its brief filed in July 2006, it argued for the first time that respondent had, by receiving payment from the United States in 2003 in partial satisfaction of his compensatory damages award, relinquished his right to attach the Cubic judgment because the property was "at issue" before the Tribunal.

In May 2007, the Ninth Circuit upheld the validity of respondent's lien. It held that respondent had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. because the judgment is not "at issue" in claims before an international tribunal. See Pet. App. 11-14. It further held that the Cubic judgment is subject to attachment under Section 201(a) of TRIA as a "blocked asset." See *id.* at 15-20.[3]

Judge Fisher agreed with the majority's holding on blocked assets, but he reasoned that the Cubic judgment is "at issue" because the Iran-U.S. Claims Tribunal "must determine the effect of the judgment on the amount of liability owed by the United States." See Pet. App. 32.

Petitioner sought rehearing and rehearing *en banc*, which were denied by the court of appeals on July 17, 2007 in an order that also made minor amendments to its earlier opinion. This Court granted certiorari. 128 S. Ct. 2957 (2008).

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[3] The appeals court further found that because there was no evidence that petitioner is a separately constituted legal entity distinct from the Iranian state, petitioner should be deemed an inherent part of the state of Iran. Pet. App. 21-25. As a result, the court held that the Cubic judgment is not subject to attachment under FSIA exceptions that are not at issue here.

G. United States' Blocking Of Petitioner's Assets.

In October 2007, the State Department designated petitioner as an entity of concern with respect to the proliferation of weapons of mass destruction. 72 Fed. Reg. 71,991, 71,992 (Dec. 19, 2007). The designation was made under delegated authority of Executive Order No. 13382, 3 C.F.R. § 170 (2006), which the President issued pursuant to his authority under IEEPA. See 72 Fed. Reg. at 71,991. By the terms of this designation, the "property and interests in property" of petitioner are now "blocked." *Id.* at 71,992.

SUMMARY OF ARGUMENT

Respondent is entitled to attach the Cubic judgment because he did not relinquish his rights to attach the judgment, which is a "blocked asset."

1. The plain language of VTVPA § 2002(d) and the statute's structure and context show that the 1998 Cubic judgment is not "property at issue in claims against the United States before an international tribunal" and thus that respondent did not relinquish his claim to execution against that judgment. The statute bars execution only against "property" placed "at issue" by being the subject of "claims" based on the Algiers Accords and filed by Iran before the Iran-U.S. Claims Tribunal. The Cubic judgment did not come into existence until 1998 and plainly was not addressed in the 1981 Algiers Accords or made the object of Iran's claim against the United States before the Tribunal. The United States' own filings before the Tribunal understood the phase "property at issue in claims . . . before the [Tribunal]" exactly as respondent does, and confirm that such property is limited to property

existing in 1981 and thus excludes the Cubic judgment. Nor could any such claim be within the Tribunal's limited jurisdiction. If there is any doubt on the scope of relinquished property, Congress directed that "statutory construction" must ensure the widest latitude for execution of judgments secured by victims of terrorism, like respondent, who receive payment for less than the full amount of their compensatory damages judgment.

There is no merit to petitioner's argument that a setoff or counterclaim asserted by the United States has made the Cubic judgment "property at issue" before the Tribunal. The statute's terms preclude petitioner's theory. Moreover, the United States does not contend that it has asserted any counterclaim or setoff that encompasses the Cubic judgment, as the Tribunal's rules would require. Any such setoff or counterclaim would not be within the Tribunal's jurisdiction in any event.

The United States' claim that property is "at issue" whenever it may be relevant to arguments raised in the B/61 case, even if the property is not identified in a claim by Iran arising under the Accords, ignores and is inconsistent with the statutory language (as well as with the U.S. positions before the Tribunal). It also ignores the broader statutory context, which demonstrates Congress' overriding intent to ensure that victims of state-sponsored terrorism who accept partial payments from the government be able to pursue robust enforcement of their judgments. In any event, even under the United States' own definition, the Cubic judgment is not "at issue" in the B/61 case because it will not, in fact, affect the Tribunal's decisionmaking, for reasons that the United States previously has acknowledged.

Finally, the statutory construction urged by petitioner and the United States could not have been intended by Congress because it is unworkable, inequitable and potentially unconstitutional. Congress must have intended to put victims on fair notice of the property rights they relinquish as a condition of accepting partial compensation for their damages resulting from acts of terrorism. Respondent's plain meaning construction provides a bright-line rule to define what property is or is not within the scope of the relinquishment, while the constructions urged by petitioner and the United States do not. To the contrary, those constructions would require that terrorism victims relinquish an open-ended and unknowable set of property rights, ultimately defined by the scope of arguments presented in secret proceedings. This inequity would be particularly acute in respondent's case because he relied on a judicial ruling that determined that the Cubic judgment was not "property at issue" before the Tribunal and because the United States took its current position only several years *after* respondent accepted his partial payment.

2. For reasons including those presented by the United States, the Cubic judgment is a "blocked asset" that is subject to attachment under TRIA § 201(a) by virtue of recent State Department action undertaken against petitioner's property. The United States' determination is entitled to substantial deference. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000). Petitioner offers no contrary analysis.

That the State Department acted after the Ninth Circuit's decision is of no moment, and petitioner's suggestion to the contrary ignores the well-established "principle that a court is to apply the law

in effect at the time it renders its decision." *Bradley* v. *School Bd.*, 416 U.S. 696, 711 (1974). Nor is there any reason for this Court to remand so that the lower courts can consider the effect of the recent designation in the first instance.

ARGUMENT

I. RESPONDENT DID NOT RELINQUISH HIS RIGHT TO ATTACH THE CUBIC JUDGMENT BECAUSE THAT JUDGMENT IS NOT "PROPERTY THAT IS AT ISSUE IN CLAIMS AGAINST THE UNITED STATES BEFORE" THE IRAN-U.S. CLAIMS TRIBUNAL.

A. Property That Cannot Be Attached Is Limited To Property Identified In An Iranian Claim Before The Tribunal Alleging That U.S. Treatment Of The Property Breaches The Algiers Accords.

Traditional tools of statutory construction readily show that the 1998 Cubic judgment is not "property at issue in claims against the United States before an international tribunal," see TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)(B)), Pet. Br. App. 11a, and thus that respondent did not relinquish his claim to execution against that judgment. There is no need to search for "structural clues" to support a "broad construction" of the statutory text, as petitioner argues, Pet. Br. 25, or to draw inferences from what "at issue" may mean in isolation in other contexts, as the United States proposes, U.S. Br. 15-16. Instead, the statute's plain language, structure and context establish that the statute bars execution only against "property" placed "at issue" by being the subject of "claims" filed by Iran before the Iran-U.S. Claims Tribunal based on the Algiers Accords. Here, no such

claim was filed or could have been filed that encompasses the Cubic judgment. Instead, as both Iran and the United States have asserted before the Tribunal, Iran's claim against the United States placed at issue only the specific arms system produced and held by Cubic in 1981. See *infra* at 26-29. Even if the statute's meaning were unclear, Congress expressly directed that "statutory construction" must ensure the widest latitude for execution of judgments secured by victims of terrorism, like respondent, who receive payment for less than the full amount of their compensatory damages judgment against state sponsors of terrorism. See VTVPA § 2002(d)(4), Pet. Br. App. 11a; *infra* at 29-32.

1. Congress defined the "property" made unavailable to victims of terrorism by reference to actual "claims against the United States" that place property "at issue" "before" particular "international tribunal[s]" that resolve disputes over identified classes of property. *Id.* § 2002(d)(5)(B), Pet. Br. App. 11a. This provision expressly applied only to certain judgments that terrorism victims secured against Iran, see TRIA § 201(d), and thus referred directly to claims against the United States before the Iran-U.S. Claims Tribunal.

The 1998 Cubic judgment was not and could not be "property" subject to and thus placed "at issue" by a "claim[] against the United States" asserted "before" the Tribunal. VTVPA § 2002(d)(5)(B), Pet. Br. App. 11a. As petitioner and the United States acknowledge, property is "at issue" when it is placed "[i]n question; in dispute." *The American Heritage Dictionary of the English Language* 929 (4th ed. 2000); see also *Black's Law Dictionary* 136 (8th ed. 2004) ("under dispute; in question"); U.S. Br. 14; Pet.

Br. 29-30 n.8. Congress clearly defined "property" in relation to the "claim" that places the property "at issue" or "in dispute." TRIA § 201(c)(4), Pet. Br. App. 11a. Congress' further reference to an "international tribunal[]," *id.*, and TRIA's inherent reference to the Iran-U.S. Claims Tribunal, focus on the property claimed before particular claims settlement tribunals, which in turn address particular property disputes that their organic documents make subject to formal claims.

Here, the Algiers Accords obligated the United States to "arrange . . . for the transfer to Iran of all Iranian properties which are located in the United States and abroad." General Decl. ¶ 9, Pet. Br. App. 18a. The Accords also created the Tribunal, Claims Settlement Decl. art. II, ¶ 1, Pet. Br. App. 20a, and provided it with limited jurisdiction to address claims relating to a particular class of property in existence as of January 19, 1981. Specifically, the Tribunal has jurisdiction over certain claims by nationals of one nation against the other, certain contractual claims arising between the nations, and, as in case B/61, "dispute[s] as to the . . . performance" of the obligations set forth in the Accords. *Id.* art. II, ¶ 3, Pet. Br. App. 21a.

The Tribunal's Rules, agreed to by Iran and the U.S., further govern when such property could formally be placed at issue as the subject of a claim arising under the Algiers Accords, and required that a party initiate arbitration by filing a "Statement of Claim" that identified "property rights out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to the . . . Claims Settlement Declaration." Trib. R. of P., art. 18.1(c), Resp. App. 5. The Statement must identify the points "at issue." *Id.* art. 18.1(f), Resp. App. 5. As

the Algiers Accords themselves indicate, the Tribunal, the United States and Iran have all determined that claims such as B/61 relate to property owned by Iran that was in existence on Jan. 19, 1981. See *infra* at 26-29.

A relatively recent federal court judgment addressing a breach of contract dispute, such as the Cubic judgment, is quite unlike the property subject to claims that the Tribunal was established to address. Typical claims by Iran concern the arms systems undelivered by 1981 as noted by President Clinton, *supra* at 12-13, or Iranian-owned real estate in the United States, including properties that the survivors of Charles Hegna sought to attach in order to enforce a judgment secured against Iran for his death. In decisions the United States and petitioner conspicuously fail to cite, four courts of appeals held that the Hegnas had relinquished their right to pursue such attachments because these real properties were directly the subject of an Iranian claim before the Tribunal, and the courts relied on the United States' presentation of evidence that Iran's pending claims in the Tribunal asserted "custody" under the Algiers Accords of the *same properties* the Hegnas sought to attach. See, *e.g.*, *Hegna* v. *Islamic Republic of Iran*, 380 F.3d 1000, 1008-09 (7th Cir. 2004) (evidence of a claim in the Tribunal "filed by Iran against the United States in 1982, alleging that the United States had breached its obligations under the Algiers Declarations by failing to grant Iran custody of its diplomatic and consular properties in the United States" and noting that the Tribunal claim "includ[es] the Chicago properties" that the Hegnas were seeking to attach) (internal quotation marks omitted); *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 485, 493 (5th Cir. 2004)

(evidence "that the Lubbock property falls within a list of properties specifically identified as the subject of the Tribunal case") (internal quotation marks omitted); see also *Hegna* v. *Islamic Republic of Iran*, 402 F.3d 97, 99 (2d Cir. 2005) (per curium); U.S. Br. 39, in *id.* (Aug. 26, 2004) ("The Consular Property is 'at issue' before the Claims Tribunal because Iran has filed a claim contending that the Consular Property . . . is being held by the United States in violation of the Algiers Accords."); *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004).

The Cubic judgment stands in stark contrast to the properties that the *Hegna* plaintiffs sought to attach or that is at issue in Iran's claim in case B/61. In that case, Iran seeks compensation from the United States based on an allegation that the United States has not fulfilled its Paragraph 9 obligations to "arrange . . . for the transfer to Iran of all Iranian properties . . . located in the United States" as of Jan. 19, 1981. General Decl. ¶ 9, Pet. Br. App. 18a. Iran's Statement of Claim in the case lists property "at issue" produced by scores of arms manufacturers. In relation to Cubic, Iran's Statement is limited to certain property held by Cubic as of Jan. 19, 1981, including most prominently the ACMR. See *Statement of Claim* (Jan. 19, 1982), L4-11, L28-75; *Iran Consolidated Submission* & Ex. 16 (Mar. 8, 1994), L102-06, 119-22, 129, 132-58.[4] The United States agrees that the Cubic "property at issue" in Iran's claim is the ACMR. See *infra* at 26-29. Iran's Statement of Claim long pre-dates and does not include the 1998 Cubic judgment. The parties principally dispute whether the United States was

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[4] At the Deputy Clerk's suggestion, certain citations (beginning "L") are directed to materials that the United States, with the parties' agreement, has sought to lodge with the Court.

required to transfer to Iran arms that, as of Jan. 19, 1981, were subject to export control restrictions and, if so, how to value Iran's loss due to the United States' failure to arrange for the properties' transfer. See, *e.g.*, *Tribunal Hearings* (Dec. 1, 7, 12, & 14, 2006), L1130-1295. The parties have also argued over precisely what property was held by Cubic as of Jan. 19, 1981, and the Tribunal has ruled that Iran's claims in that respect are limited to the items of property that Iran identified in its original Statement in 1982, as elaborated by filings made no later than 1994. See *Tribunal Order*, at 1-4 (Dec. 20, 2005), Resp. App. 32-35.

The 1998 Cubic judgment is not asserted as "at issue" in Iran's Statement of Claim or its other summaries of the "property" at issue before the Tribunal, nor could it be. The district court issued that judgment in December 1998. See 29 F. Supp. 2d 1168 (S.D. Cal. 1998), JA 55-68. That "property" did not exist when Iran and the United States entered the Algiers Accords and is not within the Paragraph 9 obligation of the United States that forms the basis of Iran's claim in Case B/61, and thus for both reasons could not be the subject of a claim within the Tribunal's jurisdiction. General Decl. ¶ 9, Pet. Br. App. 18a. Even had the Cubic judgment arisen before the Algiers Accords, the Tribunal's jurisdiction does not extend to claims by Iran against private parties, and such claims cannot put "property at issue" before the Tribunal. Claims Settlement Decl. art. II, ¶ 1, Pet. Br. App. 20a. Indeed, when Iran in 1982 attempted to pursue a Tribunal claim against Cubic related to the sale and servicing of the ACMR, and joined the United States, the Tribunal dismissed the claim based on the Tribunal's lack of jurisdiction

over the claim. See *B/66 Decision*, Pet. Br. App. 25a-29a.

Nor can the 1998 Cubic judgment somehow be treated as the same "property" as the ACMR, which is "property at issue" before the Tribunal. A U.S. federal court judgment secured by Iran against Cubic for breach of contract is property quite different from an arms system subject to Iran's Tribunal claim. The 1998 Cubic judgment reflects compensation for the breach of a private agreement between Iran and Cubic related to the resale of a modified version of the ACMR to Canada in late 1981. See *ICC Award* ¶¶ 9.15, 9.21. That resale agreement is itself distinct from the contract between Iran and Cubic concerning the manufacture and delivery of the ACMR to Iran (which Iran's Statement of Claim asserts ownership over and the U.S. contests). See, *e.g.*, *id.* ¶ 9.15.

Particularly important for purposes of identifying the "property" placed "at issue" through Iran's claim against the United States, the United States had no role in that resale contract or the legal proceedings addressing it, and had no obligations to Iran related to the resale contract, the ICC award, or the 1998 Cubic judgment. As the United States summarized,

> . . . the United States was not a party to the second agreement between Iran and Cubic, nor was it aware of that agreement, nor was it a guarantor of that agreement. Any losses in relation to that contract are not recoverable against the United States and issues regarding losses under that contract do not belong before this Tribunal.

Tribunal Hearing 124 (Dec. 12, 2006), Resp. App. 42. And, as noted, Iran has not identified the 1998 Cubic judgment as the "property" forming the basis for its

claim against the United States, and the Tribunal's rules and jurisdiction would prohibit any effort to do so.

2. Before the Tribunal, and in sharp contrast to their positions before this Court, Iran and the United States adopted precisely the position respondent is urging here. There, they made absolutely clear that the property that is the subject of Iran's claim, and at issue before the Tribunal as a result, is limited to the Cubic-produced arms system that existed in early 1981. Indeed, both assert that the particular items of property addressed in Iran's claim define the "property at issue in the claim" before the Tribunal. The Tribunal's rulings are in accord.

Following Iran's 1982 Statement of Claim, which generally identified arms systems held in the United States at the time of the Accords as the property subject to its B/61 claim, the Tribunal issued a series of orders directing the parties to identify and file a joint report addressing "property items located in the United States, which are at issue in this case." *Tribunal Order* 1 (March 2, 1984), Resp. App. 11; see *Tribunal Order* 1 (May 14, 1984) (parties to reconcile views of "any Iranian property items located in the United States which are at issue in this case"), Resp. App. 12; *Tribunal Order* (Jan. 21, 1987), L82. In the resulting report, Iran and the United States jointly set forth, "company-by-company," "the property claimed by Iran." *Joint Report*, Cover Letter (July 14, 1989), Resp. App. 14. They agreed that the "Property Claimed by Iran," as it related to Cubic, were "[i]tems comprising an ACMR." *Id.*, Ex. 22, Resp. App. 22. The United States later characterized this Joint Report summary as defining "what property was at issue in the case," *U.S. Rebuttal*, v. 1, at 19 (Sept. 1, 2003), L390, and argued that "only property that has

already been made the subject of a claim is properly at issue in this case." *Id.* at 49 (internal quotation omitted), L419; see *id.* at 52 (all "property at issue in Case B/61 must have been identified in the 1989 Joint Report"), L422. The Tribunal agreed: drawing on a Tribunal ruling that requires production of documents "only insofar as that information related to 'items of property that have already been made the subject of a claim in these Cases,'" it ruled in favor of the motion of the United States to "exclude from these Cases [pre-1981] properties and claims presented by Iran after 1994," as late-filed. *Tribunal Order* 3-4 (Dec. 20, 2005) (quoting *Order* of March 18, 1998), Resp. App. 34-35.

Other Tribunal filings and orders confirm that the parties understood that "property at issue in claims against the United States" was limited to the specific arms systems existing in 1981 and identified in Iran's formal claim. See, *e.g.*, *Tribunal Order* 4 (Mar. 18, 1998) ("the claim in these cases relates to the transfer of certain Iranian property located in the United States at 19 January 1981"), Resp. App. 27; *U.S. Response Br.*, v. 1, at 4 (Mar. 1, 2006) ("unless Iran proves with respect to each item of property at issue that it falls within the scope of Paragraph 9 of the General Declaration, the claim must be dismissed"), L1059; *Tribunal Hearing* 32 (Dec. 7, 2006) ("Iran has typically begun its analysis of each of its claims by focusing on identifying the properties that are at issue"), L1184; *id.* at 33 (not for "the United States to identify for Iran the properties that are at issue in this case"), L1185; *Iran Consol. Submission* 2-3 (Feb. 28, 1994), L102-103; *id.* at 5 n.5 ("items in issue in the instant case"), L105; *id.* at 6 ("the property in issue in case B61"), L106. In the foregoing statements and many others, the parties made clear that

the particular arms systems set forth in Iran's claim, and specifically the ACMR, defined the "property at issue in the claim" before the Tribunal. See *Tribunal Hearing* 36 (Dec. 7, 2006) (in relation to the ACMR, arguing that Iran "lacked title to the property at issue in this claim" and that Iran lacked the "expectation that it would obtain the properties at issue in this claim"), L1188; *U.S. Rebuttal*, Statement No. 16, at 12 (Sept. 1, 2003), L633 ("[t]he property at issue consists of one Air Combat Maneuvering Range ("ACMR") system"); *Iran Reply* 1 (July 2, 1999), L290 ("The items at issue are sophisticated defence equipment called Air Combat Maneuvering Range ('ACMR')"); see also *Tribunal Hearing* 6 (Dec. 7, 2006) (U.S.'s "obligation . . . is restricted to restoring Iran's financial position, with respect to the properties at issue, to that which existed prior to Nov. 14, 1979"), L1158; 2006 *U.S. Response Br.*, v. 5, at 9 (Mar. 1, 2006) ("Regarding the property at issue in this case, Iran has not and cannot show . . . ."), L1113; *id.* at 12 ("The onus is on Iran as the claimant to establish the properties at issue in its claim"), L1116.

Moreover, the United States specifically argued before the Tribunal that the Cubic judgment and related litigation was beyond the Tribunal's jurisdiction, much less property at issue in the Iranian claim. It specifically addressed respondent's efforts to attach the 1998 Cubic judgment, arguing "this litigation has nothing to do with the matters before the Tribunal." *Tribunal Hearing* 38-39 (Dec. 14, 2006), Resp. App. 44-45. It had earlier argued: "Iran has not to date been able to collect this judgment from Cubic. That, however, is not an issue for this Tribunal. Any problems that Iran might have in this regard are outside of this case and . . . outside the jurisdiction of this Tribunal." *Tribunal Hearing*

62 (Dec. 7, 2006), Resp. App. 39; see also *id.* at 49 ("Iran's ability to collect on debts owed to it by private entities is not the Tribunal's concern, however. Indeed, Iran to date has failed to show that there is jurisdiction over this claim such that it could conceivably be of a concern to the Tribunal"), Resp. App. 38. The U.S. asserted that even the resale agreement between Iran and Cubic, much less the ICC award or eventual federal court Cubic judgment, was not "at issue" before the Tribunal: "Simply put, Iran's interactions with Cubic had nothing to do with the United States .... The Iran/Cubic [resale] agreement has nothing to do with the United States." *Id.* at 60, L1212; see *id.* at 49 (as to the resale agreement breach, "this sort of claim falls outside of the Tribunal's jurisdiction"), Resp. App. 38; *supra* at 25 (quoting Dec. 12, 2006 hearing); *U.S. Rebuttal*, v. 1, at 2 (Sept. 1, 2003), Resp. App. 30-31. And, of course, the Tribunal reached a similar conclusion when in Case B/66 it dismissed, as beyond the Tribunal's jurisdiction, Iran's claim against Cubic asserting rights related to the ACMR. See *B/66 Decision*, Pet. Br. App. 25a-29a.

3. Even if respondent's obligation to relinquish rights related to the 1998 Cubic judgment were a close question, TRIA itself provides the governing canon of construction that requires judgment in respondent's favor. Specifically in relation to judgments secured against Iran, TRIA § 201(c) added to the VTVPA both the revised relinquishment provision applying to respondent and, immediately preceding it, the following provision entitled "Statutory Construction": "Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under

this section or under any other provision of law." TRIA § 201(c)(4) (adding VTVPA § 2002(d)(4)). "[T]his subsection" clearly applies to respondent's judgment secured against Iran and to the "property at issue" language that is the subject of this case, see VTVPA § 2002(d)(5), and respondent's lien was directed against "assets otherwise available . . . under any other provision of law," see *id.*, § 2002(d)(4); TRIA § 201(a), as well as "under this section." See VTVPA § 2002(a). The United States and petitioner conspicuously fail to address or even to cite this statutory directive.

This canon of "statutory construction" was only one part of Congress' broader effort through TRIA § 201 to ensure that victims of state-sponsored terrorism such as respondent could be made whole by executing their judgments against the property of such rogue states. For example, Section 201(a) broadly directs that "[n]otwithstanding any other provision of law . . . the blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgments to the extent of any compensatory damages for which such terrorist party has been adjudged liable." "[A]ny other provision of law" includes, of course, the "at issue" language of VTVPA § 2002(d)(5).

Because TRIA addressed recovery by terrorism victims of Iran who, by definition, would receive only partial compensation from the United States government, see TRIA § 201(c)(4), Congress sought to ensure that those victims' enforcement of their judgments against Iran would make up the balance of their recovery. To this end, in addition to adding VTVPA § 2002(d)(4)'s canon of "statutory construction," Congress reduced the scope of rights that victims of terrorism would relinquish, see

VTVPA § 2002(d)(5) (entitled "certain claims and rights not relinquished"), and directed that the Secretary of Treasury, in formulating implementing guidelines, "take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section." *Id.* § 2002(d)(6). Finally, as a remedial statute, TRIA and the VTVPA which it modified must be construed broadly to achieve the purpose of ensuring that victims of terrorism are compensated for the damages they suffered. See, *e.g.*, *Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991).

The legislative history accords with the plain meaning of these remedial provisions. TRIA was enacted against the backdrop of certain Executive Branch measures that had the effect of limiting victims' recovery, and the TRIA conference report explained that "this title establishes, once and for all, that such judgments are to be enforced against any assets in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, except as expressly provided in this act." 148 Cong. Rec. at S11528; see H.R. Conf. Rep. No. 107-779, at 27 ("The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties"). In addition, TRIA modified and extended the scope of victims' recovery under the VTVPA, which itself reflects Congress' efforts to ensure that victims of state-sponsored terrorism would receive payments, from the U.S. or through enforcement of their judgments, to the limit of their

compensatory awards. See VTVPA § 2002(a)-(d); H.R. Conf. Rep. No. 106-939, at 116 (2000) (purpose of VTVPA is to "help[] American victims of terrorism abroad collect court-awarded compensation and ensure[] that the responsible state sponsors of terrorism pay a price for their crimes"); *id.* at 117 (VTVPA's purpose is to address the fact that many American victims "were not able to collect on their judgements").

B. No Setoff Or Counterclaim Asserted By The United States Places, Or Could Place, The Cubic Judgment "At Issue" Before The Iran-U.S. Claims Tribunal.

Even if "property that is at issue in claims against the United States before" the Tribunal were not, in fact, limited to property subject to a *claim* by Iran, there is no merit to petitioner's atextual argument that a setoff or counterclaim asserted by the United States has made the Cubic judgment "property at issue." See Pet. Br. 31-41. Not only do the statute's terms preclude petitioner's theory, but the United States has asserted no such setoff or counterclaim, and the Tribunal's rules would not permit a setoff or counterclaim to extend to the Cubic judgment.

No alchemy can turn a "claim" into a "counterclaim" or "setoff," turn "at issue in a claim" into "at issue in a proceeding," or turn a claim "against the United States" into one "by the United States." As noted, the Tribunal was established to address particular claims identifying property held in violation of the Algiers Accords, and Congress through TRIA identified a subset of such claims against the United States in defining property that victims of terrorism cannot attach when enforcing judgments against Iran. See *supra* at 20-22. Any *counter*claim or setoff *by* the United States addressing post-1981 property

and *not* constituting an Algiers Accords claim cannot fall within that scope.

Just as fatal to petitioner's argument, the United States does not contend that it has asserted any counterclaim or setoff that encompasses the Cubic judgment. Before this Court, the United States does not point to or rely upon any setoff or counterclaim filings before the Tribunal, but instead argues that principles barring double recovery might mean that if Iran recovers the Cubic judgment that might reduce the amount of U.S. liability under any Tribunal award against it. See U.S. Br. 17-18; but see *infra* at 43-44 (noting U.S. argument at petition stage that other liens placed on the Cubic judgment would ensure no such effect on U.S. liability). Before the Tribunal, the United States made a similar argument, and did not assert any such setoff or counterclaim as provided by the Tribunal's procedures. See *U.S. Rebuttal*, Statement No. 16, 23-25 (Sept. 1, 2003), L644-46. If no such setoff or counterclaim is pending before the Tribunal, there is no basis for petitioner's argument.

In this regard, petitioner ignores the Tribunal's rules, which require that a "counter-claim" or "a claim for the purpose of a set-off" must be formally presented to the Tribunal through pleadings, and in a timely manner:

> In the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off . . . .

Trib. R. of P., art. 19 ¶ 3, Resp. App. 8. As with claims, setoffs and counterclaims must specify the

"debt [or] contract . . . out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to . . . the Claims Settlement Declaration." *Id.* art. 18.1(c), Resp. App. 5; see *id.* art. 19.4, Resp. App. 8. Petitioner does not argue that the United States has filed a relevant claim for setoff or counterclaim pursuant to the Tribunal's rules, nor could it do so. The Statement of Defense and other documents provided to respondent by the United States, which represents that it has provided all relevant documents,[5] contain no hint of any United States setoff or counterclaim that extends to the Cubic judgment, and as noted the United States does not claim otherwise.

Any such setoff or counterclaim that petitioner hypothesizes would not, in any event, be within the Tribunal's jurisdiction. The Tribunal's decisions and rules establish that its jurisdiction over claims for setoff and counterclaims is limited to claims that fall within its jurisdiction under the Claims Settlement Declaration in the first instance. See Trib. R. of P., art. 19, ¶ 3, Resp. App. 8 ("the respondent may make a counter-claim or rely on a claim for the purpose of a set-off, *if such counter-claim or set-off is allowed under the Claims Settlement Declaration*") (emphasis added). Construing the Algiers Accords in light of this rule, the Tribunal consistently has held that an "alleged right" to payment can be used for setoff "only if this right is an admissible claim under the Claims

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[5] Respondent does not have direct access to the B/61 pleadings because Tribunal pleadings are not publicly available. Petitioner and the United States recently supplied respondent with all filings in the B/61 and B/66 cases that they identified as "relating to the Cubic claims." U.S. Br. 3 n.1. The United States has agreed to lodge those documents for the Court's convenience and has requested that they be lodged under seal.

Settlement Declaration." *Computer Sciences Corp.* v. *Iran*, 10 Iran-U.S. Cl. Trib. Rep. 269, 309 (1986); see also *id.* at 310 ("counterclaims and claims for the purpose of set-off are governed by the same jurisdictional requirements"); *Westinghouse Elec. Corp.* v. *Iran Air Force*, 33 Iran-U.S. Cl. Trib. Rep. 60, 193 (1997) ("set-offs are permissible only when they meet the jurisdictional requirements for counterclaims"); *Development & Res. Corp.* v. *Iran*, 25 Iran-U.S. Cl. Trib. Rep. 20, 106 (1990) (same). Thus, the Tribunal's jurisdiction over claims for setoff and counterclaims does not extend to property, such as the Cubic judgment, that came into existence long after the Algiers Accords and with respect to which those Accords imposed no obligations upon the United States or Iran. See *supra* at 20-25.

Because the Algiers Accords, the Tribunal's rules, and the United States' practice before the Tribunal preclude petitioner's setoff/counterclaim argument, petitioner's invocation of general principles of international law is unavailing. The VTVPA and TRIA address particular claims before international tribunals, and TRIA specifically addresses particular property-related claims before the Iran-U.S. Claims Tribunal. To discern the scope of Congress' command, and the scope of respondent's relinquishment of rights under federal law, this Court need only construe and apply the federal statute by identifying property at issue in claims before the Tribunal, as determined by the Tribunal's governing documents and procedural rules. That straightforward application of U.S. law presents no occasion to accept petitioner's invitation to import general and free-floating principles of international law into the U.S. Code, see Pet. Br. 38-40, which this Court's decisions preclude in the absence of Congressional direction in

any event. See *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008).[6]

Even if this Court embarked on the course petitioner urges, it would find that there are no general principles of international practice that support petitioner's position. Instead, the jurisdiction and practices of international tribunals with respect to setoffs are specific to each tribunal and determined by each tribunal's governing documents and rules.[7]

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[6] Petitioner's invocation of "the imperative public importance of maintaining U.S. adherence to the Algiers Accords," Pet. Br. 41-44, and of canons of statutory construction that disfavor interpretations that undermine U.S. treaty obligations, *id.* at 36-38, are misplaced because the Cubic judgment is not subject to the Accords and, even if it were, any attachment of the Cubic judgment by respondent would not affect U.S. obligations under the Accords in the B/61 proceeding or otherwise. Accordingly, the "foreign policy interests of the United States," *id.* at 42, are not implicated in this case. The United States does not claim that attaching the Cubic judgment is contrary to the Accords or other treaty obligations.

[7] In relation to the procedural rules governing claims, counterclaims, and setoffs, Iran and the United States expressly modified and narrowed the UNCITRAL rules that are often employed in international arbitrations. *See* Trib. R. of P., arts. 18, 19, Resp. App. 5-9. In addition, the international legal authorities that petitioner cites show only that certain international tribunals have allowed defendants to raise claims for setoff, not that such a practice is compelled by any general rule of international law. *See* Pet. Br. 38-39; cf. *Norwegian Shipowners' Claims* (Nor. v. U.S.), 11 Reports of Int'l Arbitral Awards 309, 310 (Perm. Ct. Arb. 1922) (the governing treaty specifically extended the tribunal's jurisdiction to the setoff claims in question); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb.), 1997 I.C.J. 243, 282-83 (Dec. 17) (decision and separate opinion concerned counterclaims rather than setoffs, and the procedural rules governing that case expressly extended the court's jurisdiction to counterclaims).

In addition, the purported general principles that petitioner attempts to rely on do not support its position. For example, petitioner contends that international tribunals recognize setoffs as reductions in the recovery to a prevailing party "'because of a demand by the defendant arising out of the same transaction.'" Pet. Br. 39 n.10 (quoting *Black's Law Dictionary*). Here, the "setoff" petitioner hypothesizes does not meet this definition because the Cubic judgment is a demand by Iran against a third party and is entirely distinct from the U.S. action regarding the ACMR that is the basis of Iran's claim in the B/61 case.

C. The United States' Construction Of "At Issue" Ignores The Statute's Context And Terms And, In Any Event, Would Not Establish That The Cubic Judgment Is "At Issue" In The B/61 Case.

The United States claims that property is "at issue" whenever it may be relevant to arguments raised in the B/61 case in connection with any issue, even if the property is not actually identified in a claim by Iran arising under the Accords. See U.S. Br. 14 ("at issue" encompasses all "matters that the tribunal may find it necessary to resolve in its decision in a contested proceeding"). Forthrightly advancing a test that suits its financial interests at the expense of terrorism victims, the United States argues that the Cubic judgment is "at issue" in the B/61 case because Iran's claim against the United States "must be reduced by

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Petitioner also cites a passage from Marjorie M. Whiteman, *Damages in International Law* 248-74 (1937), but none of the decisions discussed therein suggests that there is any general rule of international law that governs jurisdiction over setoffs.

the amount of its recovery from Cubic."[8] See *id.* at 12.

1. The United States' abstract construction of "at issue" ignores related statutory language and the broader statutory context. Congress linked "property at issue" to a "claim" lodged before an "international tribunal" established, as by the Algiers Accords, to address claims over particular classes of property. This meaning is confirmed by the practices, jurisdiction, and decisions of the tribunal that Congress directly addressed in defining the "property at issue" that victims could not attach. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)) (addressing "compensatory awards against Iran"). Further, that "property at issue" phrase is embedded in a statute in which Congress repeatedly and expressly indicated its overriding intent to ensure that victims of terrorism could recover their compensatory damages from government funds and, in cases of partial compensation such as respondent's, through robust enforcement of their judgments secured against state sponsors of terrorism. See *supra* at 29-32. The United States fails to address any of these provisions reflecting an intent to compensate victims, including the "statutory construction" canon that strongly

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[8] The United States misleadingly argues that it "could be put in the position of paying twice, once directly, under TRIA, and once indirectly, by compensating Iran for the attached property." U.S. Br. 19. This is simply untrue with respect to respondent's enforcement against the Cubic judgment for two reasons. First, as the U.S. previously acknowledged, *see infra* at 43-44, other liens held on the Cubic judgment ensure that the Cubic judgment will have no effect on U.S. liability to Iran. Second, respondent received government funds under a provision that subrogated the United States to respondent's claim to the extent he is compensated from U.S. funds, enabling the U.S. to secure those payments from Iran. *See* VTVPA § 2002(a), (c).

favors respondent's position. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)(4)), Pet. Br. App. 11a. In context, a "claim" that places "property" "at issue" is a formal claim placed before a specific claims tribunal established to address a particular class of disputes over property – not, as the United States would have it, a "claim" in the sense of any argument that might be made before such a tribunal and implicating any type of property, even if plainly not subject to the tribunal's jurisdiction.

Moreover, the United States' broad construction is inconsistent with two other statutory features. First, TRIA requires relinquishment of rights to enforce against property that is either "at issue in claims against the United States before" the Tribunal or "that is the subject of awards" by the Tribunal. TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)(B)), Pet. Br. App. 11a. As the United States acknowledges, U.S. Br. 15, these two clauses must be interpreted in tandem: property "at issue" in a claim is property potentially the "subject of" a Tribunal award. Tribunal awards, however, resolve claims to specific property addressed by the Algiers Accords, *i.e.*, pre-1981 property subject to some obligation under the Accords. Therefore, property not addressed by the Accords, but that the Tribunal nevertheless may consider in the course of deciding an ancillary issue, is not property that could be the "subject of" a Tribunal award.[9] Therefore, such property cannot be "at issue in claims against the United States before" the Tribunal either. This is particularly clear for the

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[9] Tribunal decisions typically are lengthy dispositions that address a host of legal and factual issues, and then culminate in a specific "award" at the end of the document that tracks and addresses the elements of the claimant's claim. *See, e.g.*, *Computer Sciences Corp.*, 10 Iran-U.S. Cl. Trib. Rep. at 316-18.

Cubic judgment, which is not within the Tribunal's jurisdiction, not addressed by the Algiers Accords, and thus not within the class of property that Congress contemplated would be the "subject of" an "award" by the Tribunal.

Second, any Congressional desire to reduce the cost of the VTVPA payment program does not support the United States' broad relinquishment construction or otherwise create a statute biased against victims' recovery whenever there may be an incidental effect on the United States' liability. After all, the relinquishment provision arises in a statute where Congress was *authorizing* payment from public funds to victims of terrorism. Congress knew how to use means other than an anti-recovery rule of construction to protect taxpayers. In particular, the VTVPA payment program provided that the United States would be "fully subrogated" to "all rights" of the victim "against the debtor foreign state," to the extent of compensatory payments made from general Treasury funds. VTVPA § 2002(c), Pet. Br. App. 4a-5a.

2. The United States compounds its error of construing "at issue" in isolation from its statutory context by drawing analogies unrelated to TRIA and the VTVPA, and even these efforts are unavailing. The unrelated federal statutes shed no light on Congress' intent in using the term "at issue" in the context of the relinquishment provision. For example, the United States invokes 5 U.S.C. § 7701(d), a provision that requires an agency official to be notified whenever the interpretation of a civil service law within the agency's jurisdiction is "at issue" in a proceeding before the Merits Systems Protection Board. U.S. Br. 15-16. The United States reasonably suggests that this notice provision should

be construed broadly to apply to all situations in which interpretation of a civil service law "may" arise. *Id.* But this has no bearing on how the term should be interpreted in the context of a provision that addresses property formally placed at issue by statements of claim heard by a claims tribunal, or one that eliminates rights that are otherwise available to victims of state-sponsored terrorism.[10]

Nor does Federal Rule of Civil Procedure 42 support the United States' construction. Rule 42 provides that if "actions before the court involve a common question of law or fact, the court may join for hearing or trial any or all the matters at issue in the actions." The assertion that the phrase "question of law or fact" defines the phrase "at issue," U.S. Br. 15; see also Pet. Br. 29, is a *non sequitur*. The phrase "if actions before the court involve a common question of law or fact" merely establishes the conditions under which consolidation is permitted. The phrase "the court may join for hearing or trial any or all the matters at issue in the actions" then confers broad discretion on the district court to determine the scope of the consolidation. The rule does not in any sense equate the terms "question of law or fact" and "at issue."[11]

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[10] Petitioner offers no support for its bald assertion that terms similar to "at issue" in a string of federal statutes have "been given uniformly wide scope." Pet. Br. 29. In any event, the statutes cited by petitioner address contexts that have no bearing on how the term "at issue" should be interpreted here.

[11] The United States prudently does not endorse petitioner's meritless assertion that the "disjunctive form" of the relinquishment provision (addressing both "property that is at issue in claims" *or* "that is the subject of awards by such tribunal") indicates that Congress intended to make it "broad." Pet. Br. 27-28. That Congress addressed two separate and

Permanent Mission of India v. *City of New York*, 127 S. Ct. 2352 (2007), invoked by the United States, see U.S. Br. 16, in fact supports respondent's position to the extent it has any persuasive force in this context. In *Permanent Mission*, this Court addressed whether a federal court had jurisdiction over a lawsuit seeking a declaration of the validity of tax liens on real property held by a foreign sovereign, pursuant to an exception to sovereign immunity where "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). This Court held that "rights in immovable property" were clearly "in issue" in the tax lien suit because a tax lien "inhibits one of the quintessential rights of property ownership – the right to convey." 127 S. Ct. at 2356. This straightforward statutory construction supports the conclusion that the Cubic judgment is *not* property "at issue in claims against the United States" in the B/61 case. There, the City of New York's fundamental claim that it had a valid tax lien against the foreign sovereign's real property placed the foreign sovereign's "rights in immovable property" squarely in issue. Here, in contrast, Iran's claim "before" the Tribunal does not place the Cubic judgment "at issue" because the claim concerns *different property*. Iran has not made any claim relating to or arising out of the Cubic judgment and,

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foreseeable procedural phases of proceedings is hardly surprising and indicates, if anything, an equivalence of rights (rights at issue are those that may become the subject of an award). The United States similarly does not endorse petitioner's baseless assertion that "Congress sought a broad ambit for the proviso" by providing that claimants who accept partial payments relinquish "all" rights to attach property that is "at issue" before the Tribunal. *Id.* at 28. Again, Congress' use of "all" to define the scope of the rights relinquished indicates nothing about how broadly to interpret "property at issue in claims . . .," which defines when relinquishment is required.

as demonstrated, the Tribunal would not have jurisdiction over any such claim.

3. When the United States addresses the specific context of particular claims before the Tribunal, it quickly reveals that the Cubic judgment is *not* property "at issue" in the B/61 case, even under its own overgenerous construction of "at issue." As canvassed above, the United States has made clear before the Tribunal that the Cubic judgment is not "property at issue" in any claim there, and is not within the Tribunal's jurisdiction. See *supra* at 26-29.

And, before this Court, the United States confirmed that the treatment of respondent's claim, and the resolution of liens against the Cubic judgment, will have absolutely no effect on eventual U.S. liability before the Tribunal – and thus cannot be "at issue" even in the sense advanced by the United States, of affecting the amount of U.S. liability in any judgment Iran may secure against it. As the United States acknowledged at the petition stage, but now conveniently neglects to mention, the United States "would [not] benefit in any practical way" if respondent's attachment efforts are prohibited because two other claimants who did *not* accept payments under the VTVPA (and, therefore, have not relinquished their attachment rights under TRIA § 201) also have liens against the Cubic judgment. See U.S. Pet. Amicus Br. 20. Previously, the United States candidly conceded that resolution of the relinquishment issue with respect to respondent "ultimately [will not] affect the United States' ability to rely on the Cubic judgment to offset any liability it may be found to have in Case B/61." *Id.* Therefore, the Cubic judgment is not "at issue" in the B/61 case even under the United States' own definition.

Now, however, the United States asserts that "[t]his case exemplifies" a potential effect on the United States' liability because permitting respondent to attach the Cubic judgment might "increase by millions of dollars the amount the United States might be found to owe Iran." U.S. Br. 19-20. The United States does not explain its volte face or even address the other liens upon the Cubic judgment that prevent just this outcome. Whatever this case may "exemplify," it does not address "property at issue" in the Tribunal based on the Cubic judgment's availability to satisfy any U.S. liability.

Finally, the one Tribunal decision substantively addressed by the United States similarly undermines its argument. In *Futura Trading Inc.* v. *National Iranian Oil Co.*, 13 Iran-U.S. Cl. Trib. Rep. 99 (1986), the Tribunal applied a standard rule against double recovery. The Tribunal dismissed Futura's contract claim against an Iranian entity because Futura had been made whole for the same loss by collecting on a judgment against Bank of America for failure to honor a letter of credit. *Id. at* 116 (because the bank paid the judgment against it, "Futura has suffered no damage" and therefore "no longer has a cause of action in the present proceedings"). Nothing in the decision suggests that the judgment against the bank was "property at issue" even though the judgment was relevant to the eventual finding regarding liability. The Tribunal did not address or decide anything with respect to what constitutes "property at issue" before it and merely held that *no* property was properly the subject of the separate claim that it had jurisdiction to arbitrate. Indeed, the Tribunal's judgment in *Futura* (*i.e.*, the formal "award" embodied at the end of the Tribunal decision, see *id.* at 117) did not refer to the separate judgment secured

by Futura, which was thus not "the subject of" the award, further confirming that the property could not have been "at issue" in the claim. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)).

D. The Statutory Construction Urged By Petitioner And The United States Is Unworkable, Inequitable, Potentially Unconstitutional, And Thus Could Not Have Been Intended By Congress.

Finally, because Congress crafted TRIA and the VTVPA as a comprehensive effort to compensate victims of terrorism fairly, see *supra* at 29-32, it must have intended to establish a system that puts victims on fair notice of the property rights they relinquish as a condition of accepting compensation for at least a portion of their damages resulting from acts of terrorism.

The plain meaning of TRIA's relinquishment provision, as outlined above, provides just that clarity: "property at issue in claims against the United States in" international tribunals, and specifically the Iran-U.S. Claims Tribunal as contemplated by TRIA, is naturally limited to property (1) existing at the time of the Algiers Accords and that (2) would reasonably be understood by a third party, based on the nature of the property itself, as subject to a potential Iranian claim against the United States based on the Algiers Accords. This standard ensures that victims know what rights they relinquish if they choose to accept partial compensation from the federal government.

In contrast, petitioner and the United States would require that terrorism victims relinquish an open-ended and unknowable set of property rights, ultimately defined by the scope of arguments

presented in secret proceedings. Indeed, petitioner and the United States would have terrorism victims, as in this case, relinquish rights to property that did not even exist upon the signing of the Algiers Accords and that is not the subject of a claim by Iran against the United States – simply because Iran and the United States have recently addressed the property in arguments regarding the calculation of damages that Iran might secure in a separate claim addressing different property that did exist in 1981.

The operation of this standard is inequitable as well as unworkable. Terrorism victims are not provided with notice of the range of property interests that might be or become the subject of arguments before the Tribunal. If property rights "at issue" are as malleable and open-ended as petitioner and the United States suggest, victims would have no way of determining, prior to relinquishing their rights, what property remains subject to attachment and what does not. Even worse, under the theory of petitioner and the United States, the scope of relinquished property is defined by the scope of arguments conducted in secret proceedings. As noted, *supra* at 11, the United States has broadly construed the statute that authorizes the Secretary of State to maintain the confidentiality of filings before the Tribunal. See 50 U.S.C. § 1701, note. To this day, respondent has been unable to review the full record of the proceeding that supposedly precludes his recovery and has been provided with documents that Iran and the United States have deemed relevant only because they have become implicated in a case before this Court. Respondent is aware of no process for victims of terrorism to review Tribunal proceedings prior to relinquishing their rights, and

understands that the Department of State has not provided any such access to Tribunal filings.

The inequity of having to relinquish rights without notice is particularly acute in this case because respondent received what should have served as authoritative assurance that the Cubic judgment was *not* "property at issue" before the Iran-U.S. Claims Tribunal. When respondent accepted his partial payment in 2003, the district court unequivocally had held, in addressing another lienholder's rights, that the Cubic judgment was *not* "property at issue in claims against the United States" in the B/61 case. Pet. App. 91-92 ("the Court finds that the MOD's judgment does not fall within" this relinquishment provision); see Pet. Br. 16 ("the district court ruled . . . that the Cubic judgment was not 'at issue' before the Iran-U.S. Claims Tribunal"). Respondent had no way to review the scope of the confidential Tribunal proceeding and relied in good faith on this judicial ruling against the "relinquishment" argument that petitioner now revives.

Petitioner did not challenge that ruling on appeal of the district court decision. See Pet. App. 49 ("MOD does not argue that the Cubic judgment is either at issue in claims before an international tribunal or the subject of awards rendered by such a tribunal"). Moreover, when respondent accepted his partial payment in 2003, the United States had never suggested to him, or asserted in the pending judicial proceedings concerning the attachment, that he would relinquish his right to attach the Cubic judgment. The United States took this position for the first time in its amicus brief in the Ninth Circuit in July 2006 – several years after respondent received his partial payment.

The unworkable and inequitable nature of the rule petitioner proposes is flatly inconsistent with Congress' intent to benefit and treat fairly victims of terrorism. Moreover, Congress should be presumed to have avoided creating the obvious due process difficulties that petitioner's construction would present. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); see also *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001).

In the partial payment scheme, Congress expressly acknowledged that it was requiring victims of state-sponsored terrorism to relinquish "rights" to enforce against property as a condition of receiving the payments. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)). Under long-standing due process principles, Congress cannot require citizens to waive "rights" in property without providing them with full and fair notice of precisely what rights they would give up. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985); *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (a decision to relinquish a right must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"). In this context, "fair notice" requires a reasonably bright-line rule to define what property is or is not within the scope of the relinquishment. Respondent's plain meaning construction provides that clarity, but the standard articulated by petitioner and the United States does not.

II. THE CUBIC JUDGMENT IS A "BLOCKED ASSET" THAT IS SUBJECT TO ATTACHMENT BY RESPONDENT UNDER TRIA.

Congress provided that victims of terrorism such as respondent, who secure a judgment against the state

sponsor of terrorism, be able to satisfy that judgment "to the extent of any compensatory damages" by executing against or attaching "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a). For the reasons presented by the United States, see U.S. Br. 30-32, the Cubic judgment is clearly a "blocked asset" for this purpose. Petitioner presents no reason to doubt this conclusion and suggests only that the matter is best addressed initially on remand. This Court, however, can and should now confirm that the Cubic judgment is a "blocked asset" subject to attachment by respondent.[12]

A "blocked asset" for this purpose is "any asset . . . frozen by the United States under . . . sections 202 and 203 of [IEEPA]." TRIA § 201(d)(2)(A). In Executive Order 13382, President Bush invoked his IEEPA authority to declare that "all property and interests in property" of entities designated are "blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in." 70 Fed. Reg. 38,567 (June 28, 2005). In late 2007, the State Department further implemented these delegated IEEPA authorities by acting to "block" petitioner's assets, including the Cubic judgment, and thus made them subject to attachment under TRIA § 201(a). See 72 Fed. Reg. 71,991, 71,992 (Dec. 19, 2007) ("Designation") (naming petitioner as an entity "whose property and interests in property are blocked

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[12] Alternatively, respondent has no objection to the United States' suggestion that the Court "vacate the court of appeals' judgment and remand with instructions to affirm the district court's attachment order on the basis of the recent designation of petitioner." U.S. Br. 33. But the Court just as easily could affirm and remand with that same instruction.

pursuant to Executive Order 13382"). The designation was made by "the Acting Under Secretary of State for Arms Control and International Security, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies." *Id.*

As the United States explained, "[t]hat designation blocked all of petitioner's interests in property subject to the jurisdiction of the United States, including the Cubic judgment." U.S. Br. 13; see also *id.* 30 (the Cubic judgment "is now blocked and therefore subject to attachment under TRIA"). This determination is entitled to substantial deference. See, *e.g.*, *Crosby*, 530 U.S. at 386.

Respondent is clearly entitled to execute his judgment against Iran by attaching "blocked assets" such as the Cubic judgment. He "has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28." TRIA § 201(a); see *Elahi*, 124 F. Supp. 2d at 99; U.S. Br. 30. Iran has been designated by the State Department as a state sponsor of terrorism since January 19, 1984 and is indisputably a "terrorist party" within the meaning of TRIA. See TRIA § 201(d)(4). The Cubic judgment is for an amount considerably less than the compensatory damages awarded respondent in his suit against Iran, even after accounting for the partial payment he received from the U.S. government. See *Elahi*, 124 F. Supp. 2d at 115 (compensatory damages of $11.7 million compared to the Cubic judgment of $2.8 million and the partial payment of $2.3 million).

Petitioner offers no contrary analysis and provides this Court with no reason to second-guess this straightforward application of TRIA. Instead,

petitioner suggests that the Designation's effect is "not properly before the Court at this time" because the Designation was issued after the Ninth Circuit rendered its decision. Pet. Br. 45.

This argument is without merit. It ignores the well-established "principle that a court is to apply the law in effect at the time it renders its decision." *Bradley*, 416 U.S. at 711 (citing *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). This principle requires this Court to apply the Designation in deciding whether the Cubic judgment is a "blocked asset."[13]

In addition, a remand for the Ninth Circuit to consider the issue following briefing there would be pointless. The Court declined the United States' recommendation at the petition stage to follow just that course, see U.S. Pet. Amicus Br. 16-19, and now the parties have briefed the issue here. Remanding the issue to the lower courts would only prolong and delay the already protracted proceedings in this case, to the detriment of respondent and the United States' declared policy of facilitating redress for victims of state-sponsored terrorism.

Nor is there any reason for the lower courts to consider the Designation in the first instance. The Designation's effect is straightforward. See *supra* at 48-50; U.S. Br. 30. Petitioner's suggestion that

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[13] This Court consistently has held that the prevailing party may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) (citing cases); *see also McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (citing cases); U.S. Br. 12, 23 (acknowledging that the judgment below can be affirmed "based on the State Department's recent designation").

"[s]ubstantial fact issues would need to be resolved," Pet. Br. 56, is wholly unsupported. The only "fact" issue that petitioner identifies is "whether MODAFL [the entity named in the Designation] is actually the same entity as petitioner." *Id.* The United States, however, has determined unequivocally that the entities are the same. U.S. Br. 31 ("no doubt that the State Department designated petitioner"); U.S. Pet. Amicus Br. 9. The United States' interpretation of its own designation and Federal Register notice is entitled to substantial deference. See U.S. Br. 32; *Crosby*, 530 U.S. at 386.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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November 12, 2008

APPENDIX

RESPONDENT'S APPENDIX

STATEMENT NO. 16

CUBIC ITEMS

I.

IRANIAN PROPERTY AND ITS VALUE

1. The items at issue are sophisticated defence equipment called Air Combat Maneuvering Range ("ACMR"), an electronic air combat training system. This equipment, produced under the Contract entered into with the Company on 3 October 1977, has been identified in the Contract submitted in Iran's Consolidated Submission, Exhibit 16 (Doc. 204). *See* Doc. 236, CUBIC at 1.

2. As acknowledged by Cubic:

   "The ACMR equipment was fully manufactured and ready for shipment to Iran in February 1979." Doc. 236, Cubic, Attachment 4 at 2.

   The items continued to remain on the U.S. soil through 19 January 1981 until CUBIC sold them, upon making some modifications, to the Canadian Government pursuant to a contract dated 16 September 1981. *Id.*

3. The market price of the equipment, constituting Iran's remedy in the main, is the same amount at which the items were sold to the Canadian Government on 16 September 1981. This price, the Total Firm Price Items under Article 7 of the Cubic-Canadian Government Contract, is U.S. $17,139,046.50. See the excerpts at Attachment No. 1. To this amount is also to be added, at the

very least, the Contract price of: i) 4 generators, items identified as 0005AA and 0005AB in the original Contract, in the amount of U.S. $544,654.00 and ii) 4 Airborne Instrumentation subsystem (AIS), item No. 0006, in the amount of U.S. . . . .

* * * *

TRIBUNAL RULES OF PROCEDURE

3 May 1983

Introductions and Definitions

Section I.	*Introductory Rules*
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Article 2	Notice, Calculation of Periods of Time
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Article 21	Pleas as to the Jurisdiction of the Arbitral Tribunal
Article 22	Further Written Statements
Article 23	Periods of Time
Article 24	Evidence and Hearings
Article 25	Evidence and Hearings
Article 26	Interim Measures of Protection
Article 27	Experts
Article 28	Default

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STATEMENT OF CLAIM

ARTICLE 18

Text of UNCITRAL Rule

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

Modification of UNCITRAL Rule

Article 18 of the UNCITRAL Rules is modified to read as follows:

> 1. A party initiating recourse to arbitration before the Tribunal (the "claimant") shall do so by filing a Statement of Claim. Each Statement of Claim shall contain the following particulars:
>
> (a) A demand that the dispute be referred to arbitration by the Tribunal;
>
> (b) The names, nationalities and last known addresses of the parties;
>
> (c) A reference to the debt, contract (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to Article II, paragraphs 1 and 2 of the Claims Settlement Declaration;
>
> (d) The general nature of the claim and an indication of the amount involved, if any;
>
> (e) A statement of the facts supporting the claim;
>
> (f) The points at issue;
>
> (g) The relief or remedy sought;
>
> (h) If the claimant has appointed a lawyer or other person for purposes of representation or assistance in connection with the claim, the name and addresses of such person and an

indication whether the appointment is for purposes of representation or assistance;

(i) The name and address of the person to whom communications should be sent on behalf of the claimant (only one such person shall be entitled to be sent communications.)

2. It is advisable that claimants (i) annex to their Statements of Claim such documents as will serve clearly to establish the basis of the claim, and/or (ii) add a reference and summary of relevant portions of such documents, and/or (iii) include in the Statement of Claim quotations of relevant portions of such documents.

3. No priority for the scheduling of hearings or the making of awards shall be based on the date of filing the Statement of Claim.

Notes to Article 18

1. No claims with respect to which the Tribunal has jurisdiction within the framework of the Algiers Declarations and pursuant to paragraphs 1 and 2 of Article II of the Claims Settlement Declaration may be filed before October 20, 1981.

2. All Statements of Claim with respect to matters as to which the Tribunal has jurisdiction pursuant to paragraphs 1 and 2 of Article II of the Claims Settlement Declaration which are filed between October 20, 1981 and November 19, 1981 will be deemed to have been filed simultaneously as of October 20, 1981. All such claims filed between November 20, 1981 and December 19, 1981 will be deemed to have been filed simultaneously as of November 20, 1981. All such claims filed between December 20, 1981 and January 19, 1982 will be

deemed to have been filed simultaneously as of December 20, 1981.

STATEMENT OF DEFENCE

Article 19

Text of UNCITRAL Rule

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c), and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

Modification of UNCITRAL Rule

Article 19 of the UNCITRAL Rules is modified to read as follows:

> 1. Within a period of time to be determined by the arbitral tribunal with respect to each case, which should not exceed 135 days, the

respondent shall file its Statement of Defence. However, the arbitral tribunal may extend the time-limits if it concludes that such an extension is justified.

2. The Statement of Defence shall reply to the particulars (e), (f) and (g) and include the information required in (h) and (i) of the Statement of Claim (see Article 18, paragraph 1 of the Tribunal Rules). It is advisable that Respondents (i) annex to their Statement of Defence such documents as will clearly serve to establish the basis of the defence, and/or (ii) add a reference and summary of relevant portions of such documents, and/or (iii) include in the Statement of Defence quotations of relevant portions of such documents.

3. In the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off, if such counter-claim or set-off is allowed under the Claims Settlement Declaration.

4. The provisions of Article 18, paragraph 1 shall apply to a counter-claim or claim relied on for purpose of a set-off.

Notes to Article 19

1. In determining and extending periods of time pursuant to this Article, the arbitral tribunal will take into account

(i) the complexity of the case,

(ii) any special circumstances, including demonstrated hardship to a claimant or respondent, and

(iii) such other circumstances as it considers appropriate.

In the event that the arbitral tribunal determines that a requirement to file a large number of Statements of Defence in any particular period would impose an unfair burden on a respondent to a claim or counter-claim, it will in some cases extend the time periods based on the above-mentioned factors or by lot.

2. In the event of a counter-claim or claim relied on for the purpose of a set-off, the claimant against whom it is made will be given the right of reply, and the provisions of paragraph 2 of Article 19 of the Tribunal Rules shall apply.

* * * *

IRAN-UNITED STATES CLAIMS TRIBUNAL

Case No. B-61
Chamber One

THE MINISTRY OF NATIONAL DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE GOVERNMENT OF THE
UNITED STATES OF AMERICA,

Respondent.

---

2 March 1984

ORDER

1. The Tribunal's Order dated 21 December 1983 is vacated.

2. The Ministry of National Defence is invited to submit by 16 April 1984 its comments on the Requests filed by the Government of the United States of America on 27 February 1984. The Ministry of National Defence is requested by the same date to ensure that the documents, upon which it relies to substantiate its claim, are in a legible form and are presented in an intelligible way.

3. Representatives of the Parties shall meet in The Hague or any other place they may agree upon, during the week commencing 21 May 1984 in

order to identify the contracts as well as any Iranian property items located in the United States, which are at issue in this case, and to reconcile differences as to identify any discrepancies.

4. The parties shall file by 1 August 1984 a joint report arrived at pursuant to the meeting mentioned under 3 above. The report shall state to what extent an agreement has been reached with regard to the contracts and the property. The report shall describe each contract, and in so far as possible each item and indicate its owner and the present location of the item.

5. The Tribunal reserves for a later decision whether to relinquish jurisdiction to the Full Tribunal.

[Redacted]

Chairman
Chamber One

IRAN-UNITED STATES CLAIMS TRIBUNAL

Case No. B-61
Chamber One

THE MINISTRY OF NATIONAL DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE GOVERNMENT OF THE
UNITED STATES OF AMERICA,

Respondent.

---

14 May 1984

ORDER

By Order of 2 March 1984, the Tribunal scheduled further proceedings in this case.

Paragraph 2 of that Order requested the Ministry of National Defence, inter alia, to ensure by 16 April 1984 that the documents, upon which it relies to substantiate its claim, are in a legible form and are presented in an intelligible way.

The Order provided in paragraph 3 that representatives of the Parties should meet during the week commencing 21 May 1984 in order to identify the contracts as well as any Iranian property items located in the United States, which are at issue in this case, and to reconcile differences and to identify any discrepancies. Under Paragraph 4 of that Order,

the Parties were requested to file by 1 August 1984 a joint report arrived at pursuant to their meeting which report should state, inter alia, to what extent an agreement has been reached with regard to the contracts and the property.

On 16 April 1984, the Agent of the Islamic Republic of Iran requested an extension of three months for filing comments and documents as requested in paragraph 2 of the above Order. By Order of 1 May 1984, the Tribunal extended the time limit for this submission to 2 July 1984.

In a submission of 9 May 1984, the Agent of the United States of America requested that the meeting between the Parties in this case by postponed until 2 months after Iran has filed its coments and documents in response to the Tribunal's Order of 2 March 1984. The United States submits "that it is inefficient and pointless to hold a meeting at which the parties are to reconcile their differences before Iran has filed legible and organized copies of the documents that are necessary to permit the United States to identify the properties at issues in this case".

In view of all these circumstances, the meeting of representatives of the Parties as described in paragraph 3 of the Tribunal's Order of 2 March 1984 is postponed to the week commencing 17 September 1984.

The Parties shall file by 3 December 1984 a joint report as described in paragraph 4 of the Tribunal's Order of 2 March 1984.

[Redacted]

Chairman
Chamber One

July 14, 1989

Prof. [Redacted]
Chairman, Chamber One
Iran-United States Claims Tribunal
Parkweg 13
The Hague

Re: Case No. B/61

Dear Chairman [Redacted]

Pursuant to the order of this Chamber (Doc. No. 121), the parties hereby submit the Joint Report of the Government of the Islamic Republic of Iran and the Government of the United States in Case No. B/61. The Joint Report consists of two integral parts: the cover text, which indicates to what extent the parties were able to agree to categorize the property claimed by Iran, and 56 exhibits which, on a company-by-company basis, describe the relevant contract, the property claimed by Iran, and—to the extent possible—the owner of the property and its present location.

The parties' disagreement with respect to any of these four elements is explained, as appropriate, in the parties' Comments. Except as indicated otherwise, the documents attached to each exhibit are submitted by Iran in furtherance of its claim; they do not reflect any agreement between the parties regarding the documents or any legal conclusions following therefrom.

Respectfully submitted,	Respectfully submitted,
[Redacted]	[Redacted]
Agent for the Islamic Republic of Iran	Agent for the United States

CASE NO. B/61

FINAL JOINT REPORT

1. Introduction:

Pursuant to the Order dated 27 May 1987 of Chamber One, and following a week of meetings in The Hague from 9 to 13 November 1987, the Minutes of which meetings are attached hereto and have already been filed with the Tribunal, the representatives of Claimant, the Ministry of Defence of the Islamic Republic of Iran and representatives of Respondent, the Government of the United States of America, met from 3 to 6 May 1988 in The Hague in order to prepare a Joint report and to file it with the Tribunal.

2. Results of meetings:

(a) The Tribunal's Order asked the Parties to report to "what extent an agreement has been reached with regard to the contracts and the property. The report shall describe each contract, and in so far as possible each item and indicate its owner and the present location of the item." Therefore, the Parties agreed upon new categories, as follows:

Category One

Iran titled property currently located at [Redacted]

Category Two

Iranian titled property that is or has been in the possession of the U.S. company—

(A) and there is no dispute regarding the underlying contract between the

Parties to the contract; or

(B) there is no dispute about the title of Iran but there is a dispute regarding the underlying contract between the Parties to the contract.

Category Three

Property for which title is in dispute and which may be the subject of a dispute regarding the underlying contract.

(b) The following three charts show the extent to which the Parties agree about the status of Iran's properties, in view of the above categories:

1. Those items of property over whose status the Parties agree:

[Redacted]

In respect of the property subject to Category One, above, the Claimant declares that since Iran's ownership in the above category is not disputed, the United States' prevention of their export to Iran, and its failure to arrange for their transfer to Iran, constitutes a clear example of violation of the Algiers Accords. The United States Government, thus, bears liability for the ensuing damages.

As to the property subject to category 2A, the Claimant does not see any difference between them and those of category one as far as the United States' obligation for the transfer of Iranian property under Paragraph 9 of the General Declaration is concerned; nor is the remedy to which the Claimant is entitled any different. The property included in category one ([Redacted]) is an indivisible whole and undoubtedly belongs to Iran. In this connection, there is a point to be particularly stressed. This point, which

should be considered as incorporated in all discussions concerning Iran's property in the United States throughout this Joint Report, is as follows. The Claimant has been forced to transfer those items to, or let them remain at, [Redacted]—as well as the items under other categories in any part of the United States—simply because of the Respondent's failure and/or refusal to honor its obligations under the Algiers Accords and other relevant documents. This action was taken as an interim measure until the Tribunal decides Case No. B/61. The Claimant reiterates its demand for the transfer of those properties as well as for other categorized items to Iran.

Since B/1 and B/61 are two separate and independent cases, Iran objects to the comment of the United States Government regarding the duplication of items in these two cases.

U.S. Comments:

List 1 of the Joint Report includes those items whose categorization is not disputed by the Parties. By inclusion of an item in List 1, with respect to any category, the United States does not accept that Iran is entitled to possession of the item or monetary damages. The United States thus reserves the right to present its views concerning Iran's claims with regard to the items identified in this list.

Further, although for the purposes of the Joint Report, the United States has agreed to include the [Redacted], in Category 1, the United States objects to the inclusion in Case B/61 of the FMS property identified in [Redacted] As demonstrated in Exhibit 6, the [Redacted] duplicates, at least to some extent, items identified in the parties Joint Report in Case No. B/1 (Claim 4).

2. Those items of property over whose status the Parties do not agree:

LIST NO. 2

No. Name of Company	Iran Category	U.S. Category	Status of Contract List of Property Documents and Parties comments
[Redacted]			
7. Cubic	Two(B)	Three	See Ex. 22
[Redacted]			

Iran comments:

In respect of List 2, Iran believes that notwithstanding Iran's effort and good will to fulfill most of the contract, it has not been able to do because of the adverse acts of the U.S. Government from the beginning of the victory of the revolution including the non-issuance of export licenses. The U.S. Government is, therefore, responsible for any damages incurred as a result of the delay in, or non-shipment of, the items to Iran. The U.S. action is also violative of the Algiers Accords.

U.S. comments:

List 2 of the Joint Report includes those items whose categorization is disputed by the Parties. With regard to virtually all of these items, title is in dispute and there may be a dispute regarding the

underlying contract. By inclusion of an item in List 2, with respect to any category, the United States does not accept that Iran is entitled to possession of the item or monetary damages. The United States thus reserves the right to present further views regarding these items.

3. Those items of property over whose status Iran has requested an opportunity to provide further documentation or information:

[Redacted]

Iran comments:

In regard to the above list, the Claimant believes that necessary documents in respect of the remaining items have already been provided to the U.S. Government, but because of lack of the cooperation of the U.S. Companies and no presence of their representatives in the meetings, which Iran believes was necessary for definite response in compliance with the Tribunal's order, Iran is of the opinion that the U.S. Government should have invited the representatives of the respective companies to accompany the U.S. delegation. The failure to do so has resulted in not establishing the status of Iran's property. However, Iran again provided other additional documents to the U.S. Government for further investigation. As a result, the categorization of these items is temporary and the finalization of the categorization is subject to the result of U.S. Government investigation.

U.S. comments:

During the meetings held between the Parties beginning May 3, 1988, Iran stated that it had additional information to provide to the United States for approximately 25 companies. Iran also

asked that the United States clarify certain additional information with other companies. The United States has completed its investigation of the information provided by Iran and has re-contacted the relevant companies for the clarification requested by Iran. As the Parties agreed, the United States has recategorized the items, if appropriate, based on the results of its investigation.

Not all the additional information was actually provided by Iran. Iran requested an opportunity to provide additional information with respect to [Redacted]. Iran also requested an opportunity to discuss with representatives of the Iranian Navy (which was not represented at the meeting) certain information relating to [Redacted] that had been presented by the United States. Iran has still not provided this information to the United States. Accordingly, these companies are classified as "Category 3" companies, but there is no basis for any conclusion regarding the existence of the property, whether title ever passed to Iran, whether the company ever had possession of the property, and whether the property related to a contract dispute.

* * *

Claimant will claim the damages suffered because of the non-implementation of the incomplete project, which is because of the non-issuance of the export licence or the delay of issuance of the export licence by the U.S. Government.

The United States reserves the right to present its views regarding Iran's claim for damages.

The Government of I.R.I. reserves the right to file a statement and required documents in order to prove its claim with respect to all aspects at the Tribunal.

(sgd.) Representative of the Ministry of Defence of the Islamic Republic of Iran

(sgd) Representative of the Government of the United States

[Redacted]

EXHIBIT 22

Name of U.S. Company: Cubic Corporation

Description of Contract:

Contract dated October 23, 1977, between the Deputy Ministry of War for Armament and Cubic International Sales Corporation for the sale of certain subsystems and support equipment comprising an Air Combat Maneuvering Range ("ACMR") to be used by the Iranian Air Force.

Description of Property Claimed by Iran:

Items comprising an ACMR, described at pages one and two of the relevant contract, set forth in Volume 16, Exhibit 21.

Owner of Property:

IRAN COMMENT:

Iran is the owner of property and non-completion of the Contract is due to the act of the U.S. Government, and non issuance of export license since beginning of revolution.

U.S. COMMENT:

Cubic advises the U.S. Government that the Iranian Air Force informed Cubic in May 1979 that the IAF did not consider the completion of the contract "advisable and profitable" and that they desired to discontinue the contract. (Attachment 1). On June 12, 1979, and on August 3, 1979, Cubic also advises that it informed the IAF that the IAF was in breach of the contracts and that pursuant to the California Commercial Code Cubic would sell the system to another buyer. (Attachments 2 and 3). Following this notification, Cubic proceeded to sell the

items to alternative purchasers. Because title never passed to Iran and because of the contract dispute between Cubic and the Iranian Air Force, the items claimed by Iran are properly in Category 3.

Present Location of Property:

IRAN COMMENT:

Company is responsible for the property

U.S. COMMENT:

Since Cubic is not and never has been in possession of any Iranian titled property, the location of these items is unknown.

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL

The Hague

The Netherlands

[filed 4/18/95]

Case No. B/61
(including Case Nos. A/3,
A/8, A/9, and A/14)

Full Tribunal

ISLAMIC REPUBLIC OF IRAN,

Claimant,

vs.

UNITED STATES OF AMERICA,

Respondent.

CONSOLIDATED RESPONSE OF THE UNITED STATES: PART I

RESPONSE TO LIABILITY CLAIMS: BRIEF

Counsel

[Redacted]

Agent of the United
States

* * * *

[38]

A. Iran Did Not Have a Non-Contingent Ownership Interest in Much of the Property as of January 19, 1981

In order to trigger any United States obligation under the Accords to compensate Iran with respect to any of the property at issue, Iran must have possessed a non-contingent, non-partial ownership interest in that property as of January 19, 1981, the date that the parties adhered to the Accords and therefore the date that any United States obligation would have been triggered. *See* A/15 Partial Award at ¶¶ 40, 43.

Iran has not proved that it had such an ownership interest in any of the property at issue.[68] . . .

* * * *

---

[68] Iran glosses over the question of its ownership interest in the specific property at issue with sweeping and inaccurate statements. For example, the Joint Report did not resolve the issue of title to the property for the purpose of obligations arising under the Accords, despite Iran's attempt to mischaracterize that document. Iran's Brief at 5. Even where the United States and Iran agreed in the Joint Report on who had title (*i.e.*, Categories One and Two B)), such agreement went only to the question of who had title *as of July 21, 1989* (the date of the Joint Report). However, as the Tribunal is aware, the relevant date under the Accords is January 19, 1981. Finally, the United States and Iran stated explicitly that the Joint . . . .

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL

[filed 18 MAR 1998]

Case Nos. A3, A8, A9,
A14, and B61

Full Tribunal

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE UNITED STATES OF AMERICA,

Respondent.

ORDER

1. The Tribunal notes the following submissions by the Parties: Iran's submission of 8 April 1997 (Doc. 256), requesting that the Tribunal issue an Order requiring the United States to produce "two official census reports prepared by the United States in late 1980 and 1982 for the identification of Iranian properties subject to its jurisdiction" (the "Request"); the United States comments on Iran's Request, filed on 12 May 1997 (Doc. 258); Iran's submission entitled "Necessary Explanations Requested in U.S. Doc. 258," filed on 20 May 1997 (Doc. 259); the United States comments on Iran's submission of 20 May 1997, filed on 16 June 1997 (Doc. 262); Iran's comments on the United States comments of 16 June 1997, filed on 2 July 1997 (Doc. 264); the United

States response to Iran's comments of 2 July 1997, filed on 12 August 1997 (Doc. 266); Iran's comments on the United States response of 12 August 1997, filed on 12 September 1997 (Doc. 268); and the United States response to Iran's comments of 12 September 1997, filed on 1 October 1997 (Doc. 270).

2. Iran requests that the Tribunal issue an Order requiring the United States to produce (i) the information contained in reports on United States Treasury Forms TFR-615 and TFR-625, ...

* * * *

... Cases, but only insofar as they relate to items of property that have already been made the subject of a claim in these Cases. This limitation is dictated, in particular, by reasons of fairness. In connection with this consideration, it should be noted that Iran has been aware of the existence and the import of the census forms it now requests since at least 1983, when it requested in Case No. A15 (II:A and II:B) that the Tribunal order the United States to produce reports submitted on the very same Forms TFR-625 and TFR-615 at issue in the present Request (*see* Doc. 109 of 31 August 1983 in Case No. A15 (II:A and II:B)).

8. Concerning the 1980 TFR-615 census forms, the Tribunal finds that Iran has not proven that those documents are relevant and necessary for these Cases. First, while the claim in these Cases relates to the transfer of certain Iranian property located in the United States at 19 January 1981, the 1980 census forms required the reporting of property in which Iran had any interest held by persons subject to the jurisdiction of the United States *between 14 November 1979 and 31 March 1980.* Second, any relevant information in the 1980 census forms would

have been, by and large, repeated and superseded by information in the 1982 TFR-625 census forms. Pursuant to the United States Iranian Assets Control Regulations, 31 C.F.R. Part 535, "[p]ersons required to report on Form TFR-625 include, but are not limited to, all persons who reported holding tangible property as of March 31, 1980, on Treasury Department Form TFR-615." 47 Fed. Reg. 22361 (1982).

9. The Tribunal finds, further, that the significance for these Cases of the documents and information Iran gathered from the survey it conducted in 1982, *see supra*, paras. 5-6, to the extent such documents and information relate to property currently at issue in these Cases, is comparable to that of the information contained in the relevant 1982 TFR-625 census forms. Thus, the documents and information gathered by Iran may be relevant and necessary for these Cases.

* * * *

[FILED 1 SEPT 2003]

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL

The Hague
The Netherlands

Case No. B/61
(including Case Nos. A3, A8,
A9, and A14)

Full Tribunal

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REBUTTAL OF THE UNITED STATES TO CLAIMANT'S REPLY BRIEF AND EVIDENCE:

BRIEF OF THE UNITED STATES ON ISSUES COMMON TO MULTIPLE CLAIMS VOLUME I OF III (BRIEF)

Counsel:

[Redacted]

Agent of the United States

* * * *

[2] argument that it has established U.S. liability, its compensation claims are largely unsubstantiated and grossly exaggerated.

At the outset, it is as important to understand what this case is *not* about as it is to understand what it *is* about.

First, because Iran challenges U.S. obligations under the Algiers Accords, which became effective on January 19, 1981, this Case cannot concern any alleged acts or failures to act by the United States before January 19, 1981. The Algiers Accords imposed obligations prospectively and may not form the basis of liability for conduct that occurred prior to their effective date. (*See Iran v. United States*, AWD 529-A15-FT at ¶ 69 (May 6, 1992), 28 Iran-U.S. C.T.R. 112, 138-39 [hereinafter Partial Award 529] (rejecting Iran's claim for compensation for storage charges incurred and deterioration of Iranian properties suffered during the period from November 14, 1979, to January 19, 1981).)

Second, this Case is not about liability under the contracts entered into between Iran and private U.S. companies. The United States' obligations at issue in this Case are based only upon the provisions of the General Declaration. The United States has no obligations under the contracts governing the relations between Iran and the private U.S. parties that underlie the claims in this Case. In particular, the United States has no obligation to ensure that the private U.S. parties fulfill the terms on their contracts with the Iranian contracting party. While these contracts may, at times, be pertinent to some issues relevant to this Case, such as whether Iran had title to the disputed property, or whether it had

fully paid for the property for which it now seeks compensation, these contracts do not bind the United States in any manner, because the United States was never a party to them.

* * * *

[19] In a further attempt to clarify what property was at issue in the case, the Tribunal instructed the Parties to meet to discuss Iran's claims, identify any Iranian-claimed property located in the United States, reconcile differences, and then to submit a joint report.[31] During the meetings between the Parties, the United States identified information that was promised by Iran for the preparation of the joint report, but which still had not been received.[32] The Joint Report was filed on July 21, 1989. The Joint Report in no way resolved—or was intended to resolve—the points at issue between the Parties.[33] The Joint Report simply catalogued the property at issue, categorizing each piece of property according to each Party's assertions as to the location of, and . . . .

* * * *

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[31] *See* Order, Case No. B/61, May 27, 1 987 (Doc. 92) [hereinafter Order, May 27, 1987 (Doc. 92)].

[32] *See* Response of United States, Case No. B/61, Aug. 21, 1992 (Doc. 1983) at 7 8.

IRAN-UNITED STATES CLAIMS TRIBUNAL

[FILED 20 DEC 2005]

Cases Nos. A3, A8, A9, A14 and B61
Full Tribunal

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE UNITED STATES OF AMERICA,

Respondent

ORDER

I.

1. During that part of the Hearing devoted to general issues in these Cases, held on 12-14, 16, and 19-23 September 2005, the United States requested that the Tribunal, prior to hearing the individual claims in these Cases, render early decisions on a number of questions, namely:

a. whether the Algiers Declarations impose on the United States an implicit obligation to compensate Iran for losses it incurs as a result of the refusal by the United States to license exports of Iranian properties subject of U.S. export control laws applicable prior to 14 November 1979; if the Tribunal finds that the Algiers Declarations do impose such an implicit obligation on the United States, then

b. whether Iran's claims in these Cases should be dismissed for Iran's failure to cooperate;

c. whether Iran's post-1994 submissions include late-filed claims and evidence which should be excluded from these Cases;

d. whether Iran's claims should be dismissed for Iran's failure to provide its liability case;

e. whether Iran's claims for compensation should be dismissed for failure of proof;

f. whether Iran's claims for consequential damages, or "losses other than replacement value," should be dismissed; and

g. whether consideration of non-export-controlled properties in these Cases should be transferred to Case No. A15(II:A).

2. After having considered the matter, the Tribunal holds that it will decide the questions mentioned *supra*, at subparas. 1.a., 1.b., 1.e., 1.f., and 1.g., after hearing the individual claims in these Cases. The present decision is without prejudice to the Tribunal's ultimate determination of those questions.

II.

3. With respect to the United States' request mentioned *supra*, at subpara. 1.c., the Tribunal takes the following decision.

4. By its Orders of 2 March 1984 (Doc. 41) and 21 January 1987 (Doc. 121), the Tribunal ordered the Parties to meet in order to "identify the contracts as well as any Iranian property items located in the United States, which are at issue" in these Cases and subsequently to submit a joint report "arrived at pursuant to [that] meeting." The Parties submitted this Joint Report on 21 July 1989 (Doc. 171). By Order of 8 April 1993 Doc. 192), the Tribunal further requested Iran to submit its final consolidated

submission "covering all the issues to be decided in these Cases, including the legal and factual bases of the Respondent's liability . . . [and] to make any other legal and factual submissions it believes are necessary to make its case." Iran submitted its Consolidated Submission on 28 February (Docs. 199-200) and 8 March 1994 (Docs. 203-13) ("1994 Consolidated Submission"). The United States submitted its Consolidated Response to Iran's 1994 Consolidated Submission on 18 April 1995 (Docs. 219-26) and 14 August 1995 (Docs. 236-41), and Iran submitted its Reply on 2 July 1999 (Docs. 310-42). The United States submitted its Rebuttal on 1 September 2003 (Docs. 392-449), and Iran submitted "Supplement Documents" on 1 February 2005 (Docs. 466-75, 482).

5. In its present request concerning late-filed claims, the United States asks that the Tribunal exclude from these Cases properties and claims presented by Iran after 1994 on the basis that they are late-filed. Iran responds that, insofar as these Cases relate principally to the interpretation of the Algiers Declarations, they are not subject to the filing deadline contained in Article III, paragraph 4, of the Claims Settlement Declaration. In connection with Iran's assertion, it should be noted that, notwithstanding the absence of a filing deadline in these Cases, these claims relate to properties that were allegedly located in the United States on 19 January 1981 and that such claims have been outstanding since 26 March 1981.

6. The question of whether Iran could continue to add new properties to those claimed in its 1994 Consolidated Submission was raised in 1997 in connection with Iran's 8 April 1997 request (Doc. 256) that the Tribunal order the United States to produce

two census forms. In its 20 May 1997 "Necessary Explanations" of the need for those reports (Doc. 259), Iran stated that the reports "can furnish a useful indication for the determination of Iranian-owned military goods in [the] possession [of certain United States companies] on 19 January 1981 and of their value." In the United States' 16 June 1997 "Comments" (Doc. 262) on "Iran's Necessary Explanations," the United States objected to Iran's request for information concerning items that Iran had not already claimed in these Cases, asserting that it would be unfair and prejudicial to the United States to permit Iran to add claims for additional property that was not identified in Iran's 1994 Consolidated Submission, to which the United States had replied in its Consolidated Response of 18 April 1995 (Docs. 219-26) and 14 August 1995 (Docs. 236-41).

7. By Order of 18 March 1998 (Doc. 274), deciding upon Iran's document production request, the Tribunal ruled that the United States was to provide information contained in certain census forms only insofar as that information related to "items of property that have already been made the subject of a claim in these Cases." In that Order, the Tribunal expressly authorized the United States to "withhold any information concerning property that is not the subject of a claim in these Cases." The Tribunal further noted that "[t]his limitation is dictated in particular, by reasons of fairness," and it imposed the same limitation with respect to information ordered to be produced by Iran. In so deciding, the Tribunal recognized that it would be prejudicial to the United States and inconsistent with fair and orderly proceedings to permit the claims to be expanded in the course of the further pleadings.

8. The United States asserts that, despite that Order, Iran has purported to introduce claims for items of property that were not included in its 1994 Consolidated Submission. Iran asserts its right to do so.

9. In view of the above, the Tribunal rules as follows:

a. The Tribunal hereby affirms its Order of 18 March 1998 (Doc. 274). Consequently, any claims not identified in Iran's 1994 Consolidated Submission, including claims with respect to items of property not identified in that submission, shall be declared inadmissible in these Cases; similarly, any evidence submitted by Iran in support of any such claims shall be declared inadmissible in these Cases.

b. The Tribunal will rely on the Parties to identify any such claims and evidence during that part of the Hearing devoted to the individual claims in these Cases. The Tribunal will make its decisions with respect to the inadmissibility of any such claims and evidence on the basis of the Parties' submissions after the completion of the hearings on all the individual claims.

c. In line with its Order of 1 April 2005 (Doc. 488), the Tribunal accepts for inclusion in the record of these Cases any post-1994 evidence submitted by Iran, insofar as any such evidence relates to items of property that were identified and made the subject of a claim in Iran's 1994 Consolidated Submission.

[Redacted]

President

Before the

IRAN-UNITED STATES CLAIMS TRIBUNAL
The Full Tribunal

in

The Hague
The Netherlands

on

Thursday 7th December, 2006

Case B/61

(Including cases Nos. A/3, A/8, A/9 and A/14)
(IAF CASES)

ISLAMIC REPUBLIC OF IRAN,
Claimant,

v.

UNITED STATES OF AMERICA
Respondent

PROCEEDINGS

DAY FOUR

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* * * *

[49] the property itself as its remedy in this case, nor does it seek the alleged replacement value of the ACMR. Here, Iran instead primarily seeks as its remedy the gross proceeds of Cubic's resale of a substantially different system, which was sold to the Canadian Government, and which, as counsel has admitted, contained only a portion of the system for

which Iran had originally contracted. Yet, this sort of claim falls outside of the Tribunal's jurisdiction.

The implied obligation found by the Tribunal in the A/15 (II:A) Partial Award applies only to an obligation to compensate Iran for the non-return of export-controlled Iranian property. There is nothing anywhere in the Algiers Accords that turns the United States into a guarantor for the dealings between Iran and US companies.

If Iran believes that it was short-changed by Cubic in its dealings with that company, it needed to find an appropriate forum to seek its remedy against Cubic. And Iran did just that. It first tried to sue Cubic before this Tribunal. That case, Case B/66, was dismissed by the Tribunal in 1987 for lack of jurisdiction.

As previously noted, Iran then filed a claim against Cubic in 1991 before the International Chamber of Commerce, that is the forum set forth in the sales contract to resolve disputes between the contractual parties, Iran and Cubic. And, as previously noted, Iran won its claim against Cubic and was awarded more than $2.8 million, plus interest from the 1991 filing date.

So, Iran had a dispute with Cubic. That dispute has been adjudicated. That should put an end to it. Now the United States is cognizant that Iran has to date been unable to collect this judgment. The issue is winding its way through the court system. Iran's ability to collect on debts owed to it by private entities is not the Tribunal's concern, however. Indeed, Iran to date has failed to show that there is jurisdiction over this claim such that it could conceivably be of a concern to the Tribunal.

* * * *

[62] circumstances, then, the ICC Award actually constitutes a windfall. Iran was able to take money spent on a system for which it admittedly had no use—a bad investment, if you will—and obtain a partial refund. And because Iran has already obtained an award for this money, it is entitled to nothing more from this Tribunal.

Now as you heard, Iran has to date not been able to collect this judgment from Cubic. That, however, is not an issue for this Tribunal. Any problems that Iran might have in this regard are outside of this case and, the United States submits, outside the jurisdiction of this Tribunal. Still, for the sake of completeness, it should again be emphasized that, as Mr. Sellers disclosed, the United States has filed briefs on legal issues in Iran's dispute over this judgment in which the United States has noted reasons why Iran should be entitled to collect this money. Recently, the United States Supreme Court vacated a decision that would have kept Iran from collecting on the ICC award and has remanded the issue to a lower court for reconsideration.

If, however, Mr. President, it were determined that the ICC award is not the entire measure of Iran's losses and that Iran is entitled to additional compensation for this claim, then that claim must somehow be measured. For its part, Iran has failed to provide a roadmap for measuring the value of the actual property. Instead, it points to the proceeds of Cubic's sale of the property to other parties.

As described, however, the items sold by Cubic, while partially origination from the ACMR that was the subject of the Iran-Cubic transaction, ultimately bore little resemblance to that item. Cubic took that ACMR and gutted it, totally transforming the property into a new, saleable item. To use an

imperfect analogy, it took a car, stripped it, substantially modified the usable parts to specifications, made necessary additions, and sold an entirely new, enhanced, technologically superior vehicle to a different customer. Certainly the price of the new . . . .

* * * *

Before the

IRAN-UNITED STATES CLAIMS TRIBUNAL
The Full Tribunal

in

The Hague
The Netherlands

on

Thursday 12th December, 2006

Case B/61
(Including cases Nos. A/3, A/8, A/9 and A/14)
(IAF CASES)

ISLAMIC REPUBLIC OF IRAN,
Claimant,
v.

UNITED STATES OF AMERICA
Respondent

PROCEEDINGS

DAY SEVEN

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* * * *

[124] performance of its duties and it pursued its rights under that agreement to bring a claim against Cubic before the ICC.

If Iran incurred any losses, they must relate solely to that second agreement. As the ICC determined, the prior contract between Cubic and Iran, the sales contract, no longer existed after the summer of 1979.

It had been terminated for convenience. And what is important to note here, Mr. President, is that the United States was not a party to the second agreement between Iran and Cubic, nor was it aware of that agreement, nor was it a guarantor of that agreement. Any losses in relation to that contract are not recoverable against the United States and issues regarding losses under that contract do not belong before this Tribunal.

* * * *

Before the

IRAN-UNITED STATES CLAIMS TRIBUNAL
The Full Tribunal

in

The Hague
The Netherlands

on

Thursday 14th December, 2006

Case B/61
(Including cases Nos. A/3, A/8, A/9 and A/14)
(IAF CASES)

ISLAMIC REPUBLIC OF IRAN,
Claimant,
v.

UNITED STATES OF AMERICA
Respondent

PROCEEDINGS

DAY NINE

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* * * *

[38] We have addressed this point a number of times, and would point out that Mr. Bundy has offered no support for this assertion and raises it as pure speculation. Iran cannot point to any instance in which it attempted to sell the property on its own or seek the assistance of the custodian, and in which it was required to seek redress in US court. Because

it cannot point to any such instance, Iran instead invokes litigation that has no bearing on the custodians' claims to property to show the Tribunal why it was unreasonable for Iran to take these steps to mitigate.

Mr. Bundy referred to Mr. Sellers' presentation in the Cubic case in which he "gave the Tribunal a taste of the rather extraordinary lengths to which American contractors and companies were willing to go to the frustrate Iranian applications before American courts." And then he stated "For no sooner would one set of proceedings devoted by Iran to lifting attachments on Iran's properties be finished than other US companies would turn around and introduce further attachments."

It is true that Iran received an award from the ICC Tribunal in Cubic that it then confirmed in US court. And it is also true that Iran's award was then subject to attachments by US plaintiffs. But those plaintiffs were not "American contractors and companies", as Mr. Bundy asserted. They were not US property holders who were attempting to assert liens on the award or property arising out of underlying contractual disputes with the contractors.

As I noted, Iran has not been able to show a single instance of any such type of litigation.

Who were these plaintiffs? They were plaintiffs who attempted to attach the Cubic award in satisfaction of their judgment for compensation for the assassination of their family member by Iranian government operatives in France, an incident that has been confirmed by French courts.

It is surprising, first, that Iran would invoke this litigation as a reason to show this Tribunal why it was unreasonable to mitigate in this case, since this

[39] litigation has nothing to do with the matters before the Tribunal, and, second, that Iran would want to highlight before this Tribunal the incident that gave rise to that litigation in the first place.

Iran makes these arguments to attempt to show that, in light of the February Regulation, it was wholly unreasonable for Iran to take steps to mitigate. But ultimately, Mr. President, Members of the Tribunal, Iran's recitation of this untested parade of horribles in answer to Judge Aldrich's question is founded on the assertion—as Mr. Feighery stated earlier—that the February Regulation constituted a breach of the United States' obligations with respect to the export controlled properties.

And as we heard from Mr. Feighery, there could be no breach with regard to the export controlled properties.

And the only reason that Iran clings to the February Regulation, either under a theory of breach or through some other argument that the regulation made the circumstances of mitigation unreasonable, is that that is the only way Iran can offer any appearance of justification of its highly inflated claims—claims for unmitigated and un-depreciated replacement value, not to mention totally unsupported claims for consequential damages, wasted costs and the like.

And so, whether Iran would have faced difficulties in selling its property because of some confusion that could have been caused by the February Regulation for holders of export controlled properties, even if it resulted in no breach with respect to those properties, or difficulties in selling its properties in the context of the broader duty to mitigate irrespective of the Regulation, we will never know, because Iran made

no attempt whatsoever to contact property holders to sell or to arrange for the sale of this property.

Based on the many sales of property undertaken without Iran's permission, we can only speculate that the Tribunal undoubtedly would have found a very motivated group of sellers, entities that would have much preferred . . . .

* * * *

REPLY BRIEF

114

No. 07-615

Supreme Court, U.S.
FILED
DEC 10 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

REPLY ARGUMENT

Respondent ostensibly acknowledges, Resp. Br. 16,48-49, that the only real issue before this Court at this juncture is whether he relinquished any right to attach the Cubic judgment under the terms of the Terrorism Risk Insurance Act (TRIA) section 201(c) (amending the Victims of Trafficking and Violence Protection Act (VTVPA) § 2002(d)(5)(B)); Pet. Br. App. 11a. Respondent appears no longer prepared to defend the court of appeals' ruling, Pet. App. 6-12a, that the Cubic judgment was a "blocked asset" under the law prevailing at the time of the decision below. See Resp. Br. 49; *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 240 n.3 (2004); *Stevens v. Dep't of Treasury*, 500 U.S. 1, 9-10 (1991).

This Court should hold that the Cubic judgment is "at issue in claims against the United States before an international tribunal," TRIA § 201(c); Pet. Br. App. 11a, and, therefore, respondent relinquished any rights of attachment against such property when he received $2.3 million in public funds in partial satisfaction of his judgment under TRIA. Resp. Br. 9. There is no need for this Court, at this time, to rule on the status of the Cubic judgment as a "blocked asset" under TRIA, especially in light of respondent's litigation position here and the factual questions that would be attendant with such an inquiry.

I. ELAHI HAS RELINQUISHED ALL RIGHTS TO ATTACH THE CUBIC JUDGMENT AS "PROPERTY AT ISSUE IN CLAIMS AGAINST THE UNITED STATES BEFORE AN INTERNATIONAL TRIBUNAL."

Respondent's submissions boil-down to three assertions. The first is that in proceedings before the Iran-U.S. Claims Tribunal, the Cubic judgment is not a proper set-off or recoupment, such as to qualify it as being "at issue." Second, when in doubt, TRIA's relinquishment caveat should be construed in favor of parties like respondent. And, third, that it would violate due process and fundamental fairness to interpret that provision to extend to aspects of Tribunal proceedings that might be unknown to judgment-creditors.

These averments mangle the TRIA's statutory language, misconstrue the jurisdiction and procedure of the Tribunal (both generally, and with respect to the claims implicated here), and disregard other, relevant congressional enactments regarding the United States' participation before the Tribunal. Most disturbingly of all, the fundamental premise of respondent's position – that the Cubic judgment relates solely to MOD's contract with Cubic, and not the ACMR that was the subject of the contract, and is therefore not "at issue" before the Tribunal where the proceedings relate exclusively to the military system; see Resp. Br. 4, 20, 23-29 – is of dubious validity, and, moreover, was diametrically contradicted by respondent's litigation position below. Whether viewed as to their substance, or from the perspective of judicial estoppel,

respondent's contentions here are without merit.

A. Respondent is Judicially Estopped from Asserting that the Cubic Judgment is Analytically Distinct from the ACMR.

1. a. After this Court's prior ruling remanding the matter back to the court of appeals, 546 U.S. 450 (2006) (per curiam), the Ninth Circuit requested briefing, *inter alia*, on whether the Cubic judgment was a "blocked asset" under TRIA section 201. See Pet. App. 9-10a. As has already been discussed, see Pet. Br. 45-52, the Ninth Circuit had previously ruled that Elahi's attempted attachment of the Cubic judgment did not violate Treasury Regulations, see 31 C.F.R. pts. 535 & 560, concerning the disposition of Iranian assets in the United States. See Pet. App. 75-76a. The prior panel held that, for purposes of the applicability of these regulations, "MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." Pet. App. 76a (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)); see also Pet. App. 55a ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree.").

But on remand, respondent was obliged to take a different tack and to persuade the court of appeals that the Cubic judgment was – for purposes of the then-existing law concerning "blocked assets" – essentially indistinguishable from the military asset that was the original subject of the blocking regulations and the ICC arbitration: the air combat maneuvering range

(ACMR). Elahi took this position before the court of appeals:

> MOD has acknowledged that the property at issue in this case, i.e. the Cubic judgment, represents the "liquidation to a monetary amount of a military asset manufactured by Cubic and owned by MOD." Brief of Appellant at 31. Because there is no question that this military asset was in the United States prior to January 19, 1981, this property, now in liquidated form, still is subject to the United States blocking orders and, hence, constitutes "blocked assets" pursuant to the TRIA.

Elahi's Response to MOD's Supplemental Rejoinder, *Ministry of Defense v. Cubic Defense Systems, Inc.*, at 8 (03-55015), 2006 WL 3014410 (9th Cir. filed Aug. 15, 2006).

b. Rising to this overture, the court of appeals made the following ruling:

> Following release of the hostages, the United States unblocked most Iranian assets and lifted the trade embargo. However, military goods such as the ACMR remained blocked.
>
> . . . . Iran's interest in the ACMR arose in October 1977 when Iran executed the contracts with Cubic or at the latest by October 4, 1978 when Iran made a payment of approximately $12,900,000 on

> the contracts. See *MOD v. Cubic*, 29 F. Supp.2d at 1170.
>
> In sum, we find that the Cubic judgment is a "blocked asset" under TRIA because it represents Iran's interest in an asset "seized or frozen by the United States. . . under sections 202 and 203 of the International Emergency Economic Powers Act." TRIA § 201(d)(2)(A). Because TRIA § 201(a) waives attachment immunity for such blocked assets, we hold that Elahi may attach the Cubic judgment.

Pet. App. 19-20a (citations omitted).

c. As already noted, respondent has abandoned before this Court any reliance on the Ninth Circuit's rationale for declaring the Cubic judgment as a "blocked asset" under TRIA. Resp. Br. 49. As a collateral benefit of this concession, respondent now asserts a position contrary to the factual predicate of its submission below: that the Cubic judgment and ACMR are analytically indistinguishable. Here, respondent forcefully argues the antipodal contention. See Resp. Br. 23 ("the Cubic 'property at issue' in Iran's claim is the ACMR. Iran's Statement of Claim long pre-dates and does not include the 1998 Cubic judgment."), 24-25 ("Nor can the 1998 Cubic judgment somehow be treated as the same 'property' as the ACMR, which is 'property at issue' before the Tribunal."), 26-29. Because respondent no longer is relying on the Ninth Circuit's legal rationale for the Cubic judgment's characterization as a "blocked asset" under TRIA, he

deems himself at liberty to re-cast his argument as to the nature of the proceedings before the Tribunal and U.S. courts.

2. As this Court has explained in other contexts, judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000); see also *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . . ."). This equitable doctrine has deep roots in federal court practice, and is intended to preserve the integrity of the judicial process and to prevent parties from "playing 'fast and loose with the courts'." See *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (collecting cases).

"Although this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test," *Zedner v. United States*, 547 U.S. 489, 504 (2006), this Court has observed that

> several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position. . . . A third consideration is whether the party

> seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.
>
> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

New Hampshire, 532 U.S. at 750-51 (citations and internal quotation marks omitted).

As just rehearsed, in order to prevail below, respondent has taken a diametrically opposite position to that advanced here concerning the character of the Cubic judgment. Before the Ninth Circuit, Elahi argued that the Cubic judgment was in essence and unity with the ACMR. Respondent "succeeded in persuading" the Ninth Circuit "to accept that party's earlier position." Id.; see Pet. App. 19-20a.[1] Here,

---

[1] Lest respondent suggest that petitioner's position has not been consistent in regard to the legal character of the ACMR, MOD's earlier statement was in reference to a different question altogether: its status as a "military asset" under the Foreign Sovereign Immunities Act (FSIA). See 28 U.S.C. § 1611(b)(2); see also Pet. Br. 51 n.13. More significantly, petitioner's position did *not* prevail below. See *New Hampshire*, 532 U.S. at 750-51 ("Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,'

respondent has urged that "the 1998 Cubic judgment [cannot] somehow be treated as the same 'property' as the ACMR, which is 'pro perty at issue' before the Tribunal." Resp. Br. 24-25. Whether one speaks in the argot of "prejudice," *Davis*, 156 U.S. at 689, or of "deriv[ing] an unfair advantage" or "impos[ing] an unfair detriment," *New Hampshire*, 532 U.S. at 751, on the petitioner here, the result is the same: Elahi should be precluded from asserting that the Cubic judgment is of such a nature and character as to not make it "at issue" before the Tribunal.

B. The Cubic Judgment is "At Issue" Before the Tribunal as a Set-Off or Recoupment.

Even if this Court were disposed to entertain respondent's assertions on the course of proceedings before the Iran-U.S. Claims Tribunal concerning the Cubic judgment, they are without merit. Elahi has profoundly misapprehended the Tribunal's jurisdiction and procedure, as well as the current disposition of Claims B61 and B66.

1. Respondent seems to willfully miss the point of Iran's requested relief before the Tribunal in *Case B61*. As has already been briefed, Pet. Br. 5-6, Iran is seeking the return of its property or assets situated in the United States, and held in violation of the United States' obligations under paragraphs A and 9 of the

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United States v. C.I.T. Constr. Inc., 944 F.2d 253, 259 (C.A.5 1991), and thus poses little threat to judicial integrity.") (other citations omitted).

General Declaration of the Algiers Accords. See Pet. Br. App. 15a, 18a. Iran's first claim for relief is monetary compensation, particularly where specific performance is impossible (as in the case of the Cubic ACMR, since the equipment was modified and sold to Canada). See *Case B61*, Iran's Statement of Claim (dckt.1) (Jan. 19, 1982), L4-6, L25-26; Claimant's Consolidated Submission, vol. I (dckt.200) (March 8, 1994), L110-14.

The United States has publicly acknowledged that Iran's claim involves an element of monetary compensation for relief. President Clinton's Message to the Congress on Iran, May 16, 1996, available at http://clinton6.nara.gov/1996/05/1996-05-16-report-on-national-emergency-with-respect-to-iran.html (visited Nov. 27, 2008) ("Case B/61 involves a claim by Iran for compensation with respect to primarily military equipment that Iran alleges it did not receive."). If the Tribunal agrees with Iran's submission that the United States has breached its Algiers Accords obligations in relation to the export of the Cubic ACMR, and orders compensatory relief, such damages would have to be off-set by any funds that Iran would have received encompassing the value of the Cubic ACMR. The repatriation of the Cubic judgment to Iran would reflect just such a set-off or recoupment.[2]

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[2] Inasmuch as respondent relates to this Court, see Resp. Br. 25-29, the United States' submissions before the Tribunal denying liability in *Case B61*, he cannot be purporting to prejudge the merits of any Tribunal award in this case. Elahi cannot be substituting his analysis of the

2. Respondent's assertion, Resp. Br. 33, that the United States and Iran have not treated the Cubic judgment as a set-off against (or recoupment to) any recovery Iran might procure against the United States in *Case B61*, is belied by the course of proceedings before the Tribunal. As previously briefed, Pet. Br. 10-11, 32-33; U.S. Br. 16-18, Iran and the United States have mutually confirmed that if the Cubic judgment is repatriated to Iran, "th[at] amount . . . will be recuperated from the remedy sought" by Iran against the United States. J.A.76 n.2; see also U.S. Rebuttal to Claimant's Reply, Statement No. 16 (Cubic) (dckt.410) (Sept. 1, 2003), L645-46; Pet. Br. App. 31a & n.32 (if Iran "receive[s] the amounts due from Cubic under the ICC Award it will 'be recouped from the remedy sought against the United States in Case B61'. . . . Iran must not be allowed to seek additional compensation from the United States when it is presently enforcing an award against Cubic that covers the very same losses that Iran allegedly suffered.").

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strengths of the United States' case before the Tribunal for what will be the Tribunal's award, issued in due course. Were it otherwise, it would render a statutory nullity Congress's careful construction of TRIA's relinquishment caveat to cover both "property that is at issue in claims against the United States before an international tribunal *or* that is the subject of awards by such tribunal." TRIA § 201(c); Pet. Br. App. 11a (emphasis added). Respondent is certainly not suggesting that proceedings here should be stayed until such time as the Tribunal issues its award in *Case B61*, nor would such be consistent with the plain meaning of TRIA's relinquishment proviso.

Indeed, the status of the Cubic judgment and respondent's attachment have been the subject of correspondence between the Agents of the United States and Iran before the Tribunal.[3] In a January 14, 1999, communique, Iran's Agent addressed his United States counterpart, narrated that Iran had sought enforcement of the ICC Award as to Cubic in U.S. district court, and noted that "[t]he Awarded Amount, if received, is naturally to be recouped from the remedy sought against the United States in Case B61." L1025. Iran's Agent went on to note that "[i]n view of the fact that the Awarded Amount constitutes an integral part of the remedy sought in Case B61 pursued within the framework of the Algiers Declarations," and that respondent's attachment of the Cubic judgment was "incompatibl[e] . . . with the United States' obligations under the Algiers Declarations." L1026. After noting that the United States has made similar interventions before U.S. courts with respect to the enforcement of other Tribunal awards, see id. (citing *Case A27*, Award No. 586-A27-FT (June 5, 1998)),[4] the Iranian Agent

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[3] As previously noted, Pet. Br. 10 n.3, under the Claims Settlement Declaration, article VI(2), Pet. Br. App. 23a, the Agents "represent[]" their respective governments "to the Tribunal and. . . receive notices or other communications directed to it or its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal."

[4] The Tribunal has ruled that "the Algiers Declarations impose upon the United States a duty to implement the Algiers Declarations in good faith so as to

reiterated that "[t]his Awarded Amount[,] unless received by Iran, cannot be offset against any relief which the United States may be found to owe Iran with regard to CUBIC in Case B61." L1026.

Iran's position regarding the United States' right of set-off and recoupment was acknowledged in oral proceedings before the Tribunal. See Case B61 (IAF Cases), Transcript of Hearing, Dec. 1, 2006, L1145-46 ("Iran has made it clear in its written pleadings that this amount of $2.8million if in fact received by Iran should be deducted from whatever amount is awarded by the Tribunal for this claim. But to date, however, the Tribunal should be aware that Iran has received nothing from the Cubic award."). The Tribunal has been fully apprised of the status of the Cubic judgment before U.S. courts. See L1146-47 ("the tortuous history of these proceedings [in U.S. courts] are symptomatic of the extraordinary difficulties Iran faces even in relation to a final award concerning immune property."), L1214 (Transcript of Hearing, Dec. 7, 2006).

3. Both Iran and the United States have acknowledged before the Tribunal that the Cubic judgment, "if received" by Iran, J.A.76 n.2, would have to be set-off or recouped against any amounts that the United States would be obliged to Iran for breaches of the Algiers Accords:

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ensure that the jurisdiction and authority of the Tribunal are respected." *Islamic Republic of Iran v. United States*, Decision No. DEC 62-A21-FT, ¶14 (May 4, 1987), 14 Iran-U.S. C.T.R. 324, 328 (1987).

> The Tribunal's case law requires a claimant to adjust a compensation request to take these factors into consideration. . . . Indeed, the Tribunal has specifically recognized the applicability of settlement agreements and collateral decisions, even absent privity of contract with the United States and even as to different causes of action. *See Futura Trading Incorporated v. National Iranian Oil Company*, AWD 263-324-3 at ¶ 62 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99, 116 (1986); *Itel Corporation v. Iran*, AWD 530-490-1 at ¶ 36 (June 8, 1992), 28 Iran-U.S. C.T.R. 159, 174 (1992).

U.S. Rebuttal to Claimant's Reply, Statement No. 16 (Cubic) (dckt.410) (Sept. 1, 2003), L645-46; Pet. Br. App. 31a. This submission was consistent with the United States' general position before the Tribunal (to which Iran objected) that Iran was obliged to deduct certain amounts from the fair market value of the property at issue in *Case B61*, including losses it could have avoided by reasonable mitigation. U.S. Rebuttal to Claimant's Reply Brief and Evidence: Issues Common to Multiple Claims (dckt.394) (Sept. 1, 2003), L520-26; see also U.S. Response to Claimant's 2005 Reply Brief and Evidence, Vol. V, Statement No. 16 (Cubic) (dckt.572) (March 1, 2006), L1116-17 ("Included in the ICC award that Iran won from Cubic was an estimation of the value of properties. . . . Having already obtained compensation to these properties

through another proceeding, Iran should not be given a chance to gain even more money for these same items from the United States.").

4. Respondent's protestations to the contrary notwithstanding,[5] Iran's and the United States' position before the Tribunal as to the status of the Cubic judgment as a set-off or recoupment are completely consistent with that arbitral institution's jurisdiction, rules of procedure and jurisprudence.

For starters, the United States has made a timely notice of its intent to employ the Cubic judgment – "if [Iran] received the amounts due from Cubic under the ICC Award;" L645-46; Pet. Br. App. 31a & n.32 – as a recoupment from any amounts owing from the United States to Iran in *Case B61*. Such notice satisfies the Tribunal's Rules of Procedure. See Iran-U.S. Cl. Trib. R. 19(3); Resp. Br. App. 7. Respondent conveniently elides from his discussion that claims and defenses can be amended under Tribunal Rule 20, and that, in any event, the parties may waive any objections to a late-filed counterclaim or set-off. See Iran-U.S. Claim Trib. R. 20 ("During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it

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[5] Respondent is in no position to question the validity of his government's litigation position before an international claims tribunal or to call it into question here. See *Z. & F. Assets Realization Corporation v. Hull*, 311 U.S. 470, 487 (1941); *La Abra Silver Min. Co. v. United States*, 175 U.S. 423, 462-63 (1899); *Frelinghuysen v. Key*, 110 U.S. 63, 71-73 (1884).

inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal."), 30 ("A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.").

Most significantly of all, the Tribunal's jurisdiction extends to "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim," CSD art. II(1); Pet. Br. App. 20a, and the Tribunal's decisions indicate that where a respondent is merely seeking set-off or recoupment, as distinct from a counterclaim (asserting an affirmative recovery), the CSD's requirement that a counterclaim be outstanding as of the Algiers Accords, id., must be relaxed. See *Owens-Corning Fiberglass Corp. v. Islamic Republic of Iran*, Interlocutory Award No. ITL 18-113-2 (May 14, 1983), 2 Iran-U.S. C.T.R. 322, 324 (1983) ("the royalties [the Claimant] was entitled to receive were net of taxes; therefore the question of the amount of any taxes which might be owing on unpaid royalties would necessarily arise as an offset against any recovery of those royalties, even if no affirmative recovery of such amounts could be allowed as a counterclaim."); see also *Sedco, Inc. v. National Iranian Oil Co.*, Award No. 309-129-3, at ¶¶204, 236 (July 7, 1987), 15 Iran-U.S. Cl. Trib. Rep. 23, 84, 94-95 (1987).

This position has been affirmed in later Tribunal decisions, including those upon which respondent relies. See *Computer Sciences Corp. v. Islamic Republic of Iran*, Award 221-65-1, at 51-53 (Apr. 16, 1986), 10 Iran-U.S. C.T.R. 269, 309-10 (1986).

Respondent also utterly ignores the point that the Tribunal itself has already found, in *Case B66*, that "the claim in Case No. B61 raise[s] issues concerning the interpretation or performance of Contract No. 134 [the Cubic contracts] pursuant to the General Declaration." *Case B66*, Pet. Br. App. 26-27a (¶4); see also id. 28a (¶10) (the ruling in *B66* is "without prejudice to any findings [the Tribunal] may make concerning Contract No. 134 in Case No. B61."); *Case B66*, U.S. Rejoinder (Jan. 9, 1984), L1462-63.

That finding, combined with the Tribunal's jurisprudence that allows for set-offs or recoupments of amounts derived from collateral proceedings, even absent privity of contract or with respect to different causes of action (which would normally disqualify counterclaims under the Tribunal's jurisdictional principles), makes the Cubic judgment "at issue" in Tribunal *Case B61*. Respondent's cramped reading, Resp. Br. 44, of the Tribunal's award in *Futura Trading Inc. v. Islamic Republic of Iran*, AWD 263-324-3 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99 (1986), is refuted by the Tribunal's clear holding:

> [Futura's] suit against [third-party] Bank of America [BoA] was not primarily based on the contract with NIOC [National Iranian Oil Corporation] or on the Letter of Credit. Rather it was a negligence

> action based on breach of [BoA]'s duties toward Futura. *This negligence suit arose, however, out of circumstances which are both factually and legally related to the present Case.* The cause of action against [BoA] was, to a great extent, if not exclusively, dependent on the fact that, at the time of the Judgment, Futura had been unable to recover payment from NIOC through the Lette r of Credit or otherwise. *In other words, had Futura been successful before this Tribunal prior to adjudication of the suit against [BoA], the damage Futura suffered would, in any event, have been reduced by the satisfaction Futura would thereby have received as a result of its contract claim here.* Under the present circumstances, however, the Tribunal finds that although the satisfaction Futura obtained by the Judgment does not extinguish NIOC's obligations, it means, in practice, that Futura has suffered no damage. . . . [T]he Tribunal agrees[] that allowing Futura to recover both under the present claim as well as the Judgment rendered would be inequitable.

Id. ¶62, 13 Iran-U.S. C.T.R. at 116 (emphasis added). Under the same principles, any award that Iran would receive in *Case B61* for the United States' breach of its Algiers Accords obligations with respect to the ACMR would have to be offset against Iran's recovery of the

Cubic judgment as reflecting "the satisfaction [Iran] received as a result of its contract claim" in a "suit [the] circumstances [of] which are both factually and legally related" to Iran's claim before the Tribunal.

However viewed, the Cubic judgment is "at issue" in Tribunal *Case B61*.

C. TRIA's Proper Construction Supports Petitioner's Position Here.

Respondent attempts, Resp. Br. 29-32, to cloud a straightforward reading of TRIA's relinquishment caveat by resort to various hermeneutic methods. None of these should be availing.

1. The disjunctive structure of TRIA section 201(c)'s relinquishment proviso, Pet. Br. App. 11a, has already been remarked upon. See, *supra*, at 11 n.3. That Congress would seek to protect from attachment or execution both "property that is at issue in claims against the United States before an international tribunal *or* that is the subject of awards by such tribunal," id., is surely significant. Respondent's suggestion, Resp. Br. 38-40 & 41 n.11, that "property . . . at issue in [a] claim[]"[6] must inevitably be related to

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[6] Respondent's assertion that Congress's use of the word "claim," precludes property that would be subject to a counterclaim, set-off or recoupment before the Tribunal, verges on the frivolous. The Claims Settlement Declaration refers generically to "claims" and "counterclaims" as being within the Tribunal's jurisdiction, see CSD, arts. I, II; Pet. Br. App. 19a-21a, and does not analytically distinguish their treatment.

"the subject of" the Tribunal's final award, as reflected in the *dispositif* of the sentence, is fanciful. It should be enough that Iran and the United States have stipulated before the Tribunal that the Cubic judgment, if received by Iran, will be deducted from any amounts owing by the United States to Iran in *Case B61*. In TRIA's relinquishment proviso, Congress imposed no technical requirement on the form and substance of Tribunal awards, or restrictions on the course of proceedings before that arbitral institution – nor could it.

Where Congress has legislated the legal consequences of U.S. participation before international claims institutions, this Court has consistently assumed that Congress defers to the State Department, not only with respect to the actual conduct of those arbitrations, but also to the characterization of those proceedings and awards under U.S. law. See *Z. & F. Assets*, 311 U.S. at 487 ("proceedings before such a commission might easily give rise to questions between the governments concerned and might involve diplomatic representations or protests with which it would be the duty of the Secretary of State to deal. Whatever might be said of such representations or protests, or the occasion for them, or with respect to the existence of any international right or obligation arising from the agreement setting up the Commission, Congress could, and naturally would. . .look to the Secretary of State for the exercise of his appropriate authority on behalf of the Executive and thus for his judgment upon the question whether the proceedings had been such as duly to qualify the awards for

payment.") (citing *Frelinghuysen*, 110 U.S. at 75; *United States ex rel. Boynton v. Blaine*, 139 U.S. 306, 323, 325 (1891)). Likewise, in construing TRIA's relinquishment caveat, it should be assumed that Congress intended a broad meaning for "property . . . at issue in claims against the United States."

2. Respondent places great weight on TRIA section 201(c)(4)'s statutory construction provision, which states, in its entirety, "Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under this section or under any other provision of law." Pet. Br. App. 11a. As previously observed, Pet. Br. 28 n.7, this can offer no succor to respondent.

This is not a general-purpose, "when-in-doubt-construe-in-favor-of-terrorist-victims" *meta*-command by Congress, as respondent maintains. It applies only to "judgment[s] to which this subsection applies," and so obviously begs the question of whether the party holding the judgment in question has waived his right to attach under TRIA section 201(c)(4)'s relinquishment caveat. Moreover, the statutory construction provision is qualified in another way; it applies only "against assets otherwise available under this section." This is a clear reference to the relinquishment caveat that follows this clause. See Pet. Br. App. 11a. TRIA's "statutory construction" provision says nothing about the scope of relinquishments, which sorts of property are "at issue" before an international tribunal, or any

other matter relevant to this case.[7]

3. Respondent's parsing of TRIA's legislative history is equally unenlightening. It is true that Congress evinced an interest to "deal comprehensively with the problem of enforcement of judgments," but this was specifically in relation to those procured under FSIA section 1610(f), now codified at 28 U.S.C. § 1605A. See TRIA Legisl. Hist., at 27, 2002 U.S.C.C.A.N. at 1434. Even more pertinently, the TRIA conference report indicated that the legislation sought, "once and for all, that such judgments are to be enforced against any assets in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, *except as expressly provided in this act*." 148 Cong. Rec. at S11528 (emphasis added). TRIA section 201(c)'s relinquishment caveat was, obviously, an "express[]" provision concerning, and qualification of, judgment-creditors' rights to proceed "against any assets in the U.S." Nothing in TRIA's legislative history bears on the proper construction of the relinquishment caveat.

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[7] Petitioner is by no means suggesting that this "statutory construction" clause is devoid of meaning. To the extent that recourse to TRIA's sparse legislative history is even appropriate here, it may be that Congress desired to make clear that the class of eligible parties, "left out of" the VTVPA, were grandfathered into TRIA's provisions. See *Terrorism Risk Insurance Act of 2002*, H. CONF. REP. 107-779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434 ("The Conferees have sought to correct this injustice.") [TRIA Legisl. Hist.].

D. Neither Equity or Due Process is Offended by Enforcing Congress's Relinquishment Caveat.

None of respondent's submissions controvert that TRIA's "at issue" language should be granted a broad construction. See Pet. Br. 25-31; U.S. Br. 13-21. But it is hardly necessary for this Court to afford any extended ambit to the "at issue" formulation, in order to cover the circumstances presented here. It is enough that the United States stands to benefit in proceedings before the Tribunal if the Cubic judgment is released from Elahi's lien and is remitted to MOD. However the Cubic judgment is characterized, Iran will be obliged before the Tribunal to deduct it from any award due from the United States in *Case B61* – but only if it is actually received by MOD.

In the face of this straightforward submission, respondent is reduced to suggesting, Resp. Br. 45-48, that any such application of TRIA's relinquishment caveat on these facts would render the provision inequitable, or even unconstitutional. Respondent particularly complains about the secrecy of proceedings before the Claims Tribunal, and that he could not possibly have made a constitutionally-knowing relinquishment of his right to attach the Cubic judgment. Resp. Br. 11, 46-47. This technique of statutory construction, via parade-of-horribles, is discredited – and for good reason. See *Small v. United States*, 544 U.S. 385, 399-402 (2005) (Thomas, J., dissenting, joined by Scalia & Kennedy, JJ.); *N.L.R.B. v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 583-84 (1994); *Dickman v. C.I.R.*, 465 U.S. 330,

341-42 (1984). In any event, respondent's submission makes no sense here; Congress has prescribed the public availability of Iran-U.S. Claims Tribunal proceedings and respondent (or anyone, for that matter) was on sufficient notice that the Cubic judgment was "at issue" in *Case B61*.

1. In Title V of the Foreign Relations Act for FY 1986 and 1987, Congress legislated the "confidentiality of records" for proceedings before the Iran Claims Tribunal. Pub. L. No. 99-93, Title V (Iran Claims Settlement), § 505, 99 Stat. 437 (1985). Congress indicated that, the provisions of the Freedom of Information Act, 5 U.S.C. § 552, notwithstanding,

> records pertaining to the arbitration of claims before the Iran-United States Claims Tribunal may not be disclosed to the general public, except that –
>
> (1) rules, awards, and other decisions of the Tribunal and claims and responsive pleadings filed at the Tribunal by the United States on its own behalf shall be made available to the public, unless the Secretary of State determines that public disclosure would be prejudicial to the interests of the United States or United States claimants in proceedings before the Tribunal, or that public disclosure would be contrary to the rules of the Tribunal; and
>
> (2) the Secretary of State may determine on a case-by-case basis to make such

> information available when in the judgment of the Secretary the interests of justice so require.

Id. This legislation was partially justified, in the Executive branch's proposal, out of a concern for protecting litigation materials exchanged at the Tribunal under strictures of confidentiality. *The Iran Claims Act*, H.R. Subcomm. on Intl. Econ. Pol'y & Trade of the Comm. on Foreign Affairs, Hearing on H.R. 3241, 98th Cong., 1st Sess. 1, 8 (June 16, 1983) (prepared statement of Michael J. Matheson, Deputy Legal Advisor, Dep't of State) ("certain documents received on a basis of confidentiality from the Tribunal, unless classified, may [without this legislation] be required to be disclosed to the public.").; id., S. Comm. on Foreign Relations, Hearing on S. 771 & 1166, 99th Cong., 1st Sess. 77 (May 20, 1985) (testimony of Michael J. Matheson) ("pleadings to the Tribunal, which under the Tribunal rules are to be held in confidence.").

So, if respondent has concerns about the public availability of Tribunal litigation documents, particularly those filed by Iran, that is a matter for Congress, and it can hardly be gainsaid that it is within Congress's plenary authority, pursuant to the United States' obligations under a treaty instituting an international claims settlement, CSD, art. III(2), Pet. Br. App. 21a; Iran-U.S. Cl. Trib. R. 32(5), to stipulate the access of private parties to the proceedings of such institutions. See *Z. & F. Assets*, 311 U.S. at 487; *Frelinghuysen*, 110 U.S. at 75.

2. In any event, the public was certainly on notice as to the connection between Cubic and *Case*

B61, by virtue of the Tribunal's 1987 award in *Case B66*. Pet. Br. App. 25a. That decision, which was publicly-released, clearly references Cubic's contracts 134 and 134a with the Iranian Air Force, entered into on October 23, 1977. See id. These same contracts were cited in petitioner's original petition for an order confirming a foreign arbitral award. J.A.22-23 (¶IV). Indeed, the district court, in issuing such an order, referred to these contracts. J.A.56. This was certainly sufficient to put any judgment-creditor in Elahi's position, about to execute a TRIA relinquishment, that the Cubic judgment might not be within the universe of available assets to attach because it was "at issue" before the Iran Claims Tribunal.

To the extent that respondent is heard to complain about the general secrecy of arbitral proceedings (whether before the Iran Tribunal or the International Chamber of Commerce (ICC)), such is inconsistent with this Court's endorsement of arbitration institutions, despite the paradigmatic confidentiality of the proceedings as between private disputants. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 288-89 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008).

3. Respondent's novel arguments concerning due process, see Resp. Br. 45-48, are wholly unwarranted. The standard articulated by petitioner and the United States simply does not "raise serious constitutional problems," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), or interpret the statutory language to

"invoke[] the outer limits of Congress' power," *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001), such that this Court should read "at issue" so narrowly as to reach the vanishing-point. Despite respondent's assertion of due process "difficulties," Resp. Br. 48, the interpretation of the relinquishment provision, advanced by petitioner and the United States, provides adequate notice of the property interests at stake.

If the government may, pursuant to the United States' international obligations and the President's recognition powers, nullify attachments and liens on Iranian assets in the United States, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981), then surely it does not violate due process when parties such as respondent accept, without coercion and upon the advice of counsel, a statutory invitation to relinquish property interests in order to receive immediate compensation. Respondent's assertion that Congress "require[s] citizens to waive 'rights' in property," Resp. Br. 48, mischaracterizes the nature of the partial payment scheme. The relinquishment provision was only triggered "at the [respondent's] election" to opt into the partial payment scheme. VTVPA § 2002(a)(1), Pet. Br. App. 1a; see also TRIA § 201(c)(4), Pet. Br. App. 11a (an eligible person's "election" to receive partial payment puts the terms of VTVPA § 2002(a)(2)(D) into effect). When respondent accepted $2.3 million as partial payment of his claim by the U.S. Treasury, he received a valuable property interest *in exchange for* his decision to forgo another property interest. This hardly resembles a deprivation without

notice, or a potentially erroneous deprivation.[8]

II. THIS COURT SHOULD NOT CONSIDER, IN THE FIRST INSTANCE, WHETHER THE CUBIC JUDGMENT IS A "BLOCKED ASSET" UNDER THE OCTOBER 2007 DESIGNATION.

As previously noted, *supra*, at 1, respondent appears no longer prepared to defend the Ninth Circuit's holding and rationale that the Cubic judgment was a "blocked asset," within the meaning of TRIA at the time of the decision below. Resp. Br. 49. Respondent is obviously free to make these choices as to litigation strategy, but they must come with consequences. One of these is with respect of judicial estoppel as to the factual predicates of positions

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[8] Respondent's claim that the United States must guarantee a "full awareness" of the right and the consequences of its relinquishment, Resp. Br. 48, depends on a case concerning the fundamental right to counsel, not the exchange of property interests in a civil context. See *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (rights conveyed in the *Miranda* warnings may be waived only if done "voluntarily, knowingly and intelligently") (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). To import that criminal procedure standard into the context of property interests would be unprecedented. See *New York v. Hill*, 528 U.S. 110, 114 (2000) (distinguishing procedures required for waiver of fundamental rights from those required for waiver of other rights). Even were the Court to do so, the process provided here was more than adequate, particularly given the weighty governmental interests supporting the United States' position. See Pet. Br. 41-44.

proffered – and accepted – below. See *supra*, at 3-8. The other has to do with the permissible reach of this Court in deciding factual and legal grounds which have never been raised or considered previously.

While it is true that a prevailing party on appeal may assert any ground in support of a ruling, whether or not relied upon or considered by a trial court, that principle comes with two major qualifications. The first, recognized in the cases upon which respondent depends for this principle of appellate procedure, see Resp. Br. 51 n.13, is that if an appellee or respondent shifts terrain in order to snatch victory out of the jaws of defeat, the facts necessary for such a strategic withdrawal had better be in the record. See *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924) ("appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record.")). The second condition, mentioned in *Dandridge*, is the obvious concern for judicial economy: "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." Id. (citing *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947); *United States v. Ballard*, 322 U.S. 78, 88 (1944)).

In relation to the Secretary of State's October 2007 designation of the Ministry of Defense and Armed Forces Logistics (MODAFL), 72 Fed. Reg. 71,991 (Oct. 25, 2007), there are two, connected sets of factual

issues that would need to be determined by a trial court. The first is whether such designation actually extends to the petitioner in this case, the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MODSAF-IRI"), as identified in the petition for an order confirming a foreign arbitral award. J.A.21. Designations made by the Secretary of State are routinely litigated in U.S. courts as to whether they apply to particular entities, and such are treated as questions of fact. See *Chai v. Dep't of State*, 466 F.3d 125, 130-32 (D.C. Cir. 2006); *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir. 2004).

The second issue is whether MODSAF-IRI, even if covered by the designation, is the ultimate beneficiary of the Cubic judgment such as to render it a "blocked asset" under Executive Order 13382, 3 C.F.R. 170 (2006). Petitioner is obviously not "disput[ing] that it is a proper party to its own judgment," U.S. Br. 31, only that the Iranian Air Force would be the ultimate beneficiary of the Cubic judgment, under the relevant Iranian law. See Act of 28 Mordad 1368, art. 4 (Iran Aug. 19, 1989) (organic statute for MODSAF-IRI). That MODSAF-IRI was acting for the Iranian Air Force in seeking confirmation of the Cubic award, and procuring the Cubic judgment, has been manifest in proceedings before the Iran Claims Tribunal, see L24, L1133, and U.S. courts. See J.A.23 (¶VI).

In light of the divergent positions taken by respondent in this litigation, this Court should not reach the question of whether the Cubic judgment is a

blocked asset under TRIA. In the event that this Court rules that respondent has not otherwise relinquished his right to attach, the proper judicial course would be to vacate the court of appeals' judgment on this point, and remand for further proceedings.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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December 11, 2008

SUPPLEMENTAL BRIEF

94

No. 07-615

Supreme Court, U.S.
FILED
MAY 30 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Dariush Elahi, respectfully submits this supplemental brief in response to the brief of the United States as *amicus curiae* and in further opposition to the petition for a writ of certiorari filed by the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD").

In its brief, the United States recasts the question presented by MOD for review into two separate questions. First, whether MOD's judgment against Cubic Defense Systems (the "Cubic judgment") is a "blocked asset" subject to attachment under Section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2337 (2002), and, second, whether the Cubic judgment is "at issue" before the Iran-U.S. Claims Tribunal such that Mr. Elahi has relinquished his right to attach the judgment under the TRIA.

With respect to the second question, the United States agrees that the Ninth Circuit's ruling does not warrant this Court's review because (1) MOD has not established that resolution of the issue would be "of practical consequence to it" (Amicus Br. at 10) and (2) the Ninth Circuit's ruling is not in conflict with the decisions of other courts of appeal. Amicus Br. at 20.

As to the first question, the United States also agrees that the Ninth Circuit's holding that the Cubic judgment is "blocked" does not conflict with the

rulings of other courts of appeal. Amicus Br. at 18 n. 5. The United States additionally acknowledges that the "property and interests in property" of MOD are now "blocked" pursuant to a October, 2007 designation of the Department of State. Amicus Br. at 9. Nonetheless, the United States submits that this Court should issue a GVR order as to the second question because at the time the Ninth Circuit issued its ruling, the United States contends that the Cubic judgment was not "blocked" (although it is now) and the court's amended opinion contains language that is "clearly wrong." Amicus Br. at 10.

In requesting GVR, the United States is seeking not even a correction in the result below since the United States acknowledges that all of MOD's assets are now "blocked." Amicus Br. at 9. What the United States wants is merely to edit the language of the Ninth Circuit's opinion. Correction of a lower court's opinion, especially where the result would not be affected is not the business of this Court.

Moreover, the reason given by the United States for requesting GVR is the speculative possibility that the Islamic Republic of Iran will use the language of the Ninth Circuit's opinion to support its claims against the United States in the Iran-U.S. Claims Tribunal. This concern over the hypothetical use of the appeals court language stands in sharp contrast to the clear prejudice that would immediately befall Mr. Elahi if the Ninth Circuit's judgment is vacated. This result would cause continued delay in Mr. Elahi's ability to obtain redress for the assassination

of his brother by agents of Iran and would be contrary to the United States' professed interest in combating and deterring international terrorism. Finally, GVR would be inappropriate in this case because, notwithstanding the views of the United States, the Ninth Circuit's opinion was not "clearly wrong."

I. The Position of the United States Does Not Change the Result of the Ninth Circuit's Decision: the Cubic Judgment Is a Blocked Asset.

Even if this Court were to adopt the argument of the United States that the Cubic judgment was not blocked at the time the Ninth Circuit issued its opinion, the United States acknowledges that there have been subsequent developments affecting this case. These developments militate against further review by this Court of the Ninth Circuit's judgment.

On October 25, 2007, the Department of State designated the Iranian Ministry of Defense and Armed Forces Logistics as an entity supporting nuclear proliferation and "blocked" all of its assets. 72 Fed. Reg. 71,991-71,992. Additionally, the United States has affirmed that this entity is the same as MOD. Accordingly, the "property and interests in property" of MOD are now "blocked." Amicus Br. at 9, quoting 72 Fed. Reg. at 71,992. Hence, there can be no dispute that the Cubic judgment is "blocked" by the United States and constitutes a "blocked asset" subject to attachment under the TRIA.

Accordingly, even if the United States were correct and the Ninth Circuit's reasoning on the "blocked asset" issue were flawed, it does not matter. Whether this Court accepts the reasoning of the United States or that of the Ninth Circuit, the result still is the same: the Cubic judgment is subject to attachment under the TRIA by Mr. Elahi.

II. GVR Is Not Warranted by This Court's Criteria for Review and Would Be Unduly Prejudicial to Mr. Elahi and U.S. Policy to Combat Terrorism.

A. The United States Has Failed To Identify Any Reasons for GVR Other Than To Amend the Language of the Ninth Circuit's Opinion.

In essence, the United States has requested GVR because it contends that the Ninth Circuit contains language that is flawed. Such a request for opinion correction, especially where the result would not change, satisfies none of the criteria governing review by this Court. See Sup. Ct. Rule 10.

This especially should be the case because, as the United States acknowledges, the Ninth Circuit's opinion does not create any conflict among the courts of appeal. See Amicus Br. at 18 n.5. Additionally, the United States has not identified any concrete national or foreign policy concerns that would justify or necessitate this Court's review. At most, the United States raises the "prospect" that Iran "*could* use the

court of appeals' admittedly erroneous statement [in its opinion] before the [Iran-U.S.] Claims Tribunal" to assert that, if the Ninth Circuit's decision "is correct, the United States is in 'manifest violation of the Algiers Accords.'" Amicus Br. at 17, quoting Pet. 27 (emphasis added). The United States voices concern about this prospect even though the United States admits that in these legal proceedings, MOD has taken the position that "consistent with the United States' undertakings in the Algiers Accords, the President *did* lift the blocking orders with respect to the assets at issue here." Amicus Br. at 17, citing Pet. at 27, 25-30.

In short, the United States' professed concern about the implications of the Ninth Circuit's opinion is nothing more than a remote, hypothetical concern about an argument that Iran "could" make before the Claims Tribunal. It does not justify this Court's intervention.

B. Prolonging These Proceedings Is Prejudicial to Mr. Elahi and to the U.S. Policy of Combating International Terrorism.

In enacting the statute pursuant to which Mr. Elahi obtained his judgment against Iran, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. II. § 221(a), 110 Stat. 1241 (1996), Congress recognized the importance of providing victims of state-sponsored terrorism "an important economic and financial weapon against . . .

outlaw states," such as the Islamic Republic of Iran. See *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 113 (D.D.C. 2000). Mr. Elahi's brother, Cyrus, was successfully targeted by Iran for assassination because he had become a vocal and effective advocate for a "free and democratic Iran." *Id.* at 103. It has been almost *eight years* since Mr. Elahi obtained his judgment against Iran for his brother's murder and almost six years since the district court upheld the validity of Mr. Elahi's lien on the Cubic judgment.

It should be beyond dispute that the passage of time for victims of state-sponsored terrorism to obtain financial redress from rogue nations like Iran diminishes the effectiveness of the legislation enacted by Congress for the specific purpose of redressing terrorist acts and deterring outlaw nations from sponsoring terrorism in the future. Should this Court follow the suggestion of the United States and issue a GVR order, the result will only further delay Mr. Elahi's ability to collect even a partial amount of his judgment against Iran – a nation whom the United States has branded as "the most active state sponsor of terrorism" in the world today. United States Department of State, *2007 Country Reports on Terrorism* (April, 2008).

Even if on remand the Ninth Circuit again finds in Mr. Elahi's favor, given its track record, MOD undoubtedly will seek certiorari, further prolonging what should be the inevitable – a ruling that Mr. Elahi has a valid and enforceable lien on the Cubic judgment. Moreover, in Mr. Elahi's case continued

delay in resolving the validity of his lien further prolongs the resolution of the pending appeals in the Ninth Circuit involving the Cubic judgment. Both MOD and Cubic have taken appeals of the district court's order confirming MOD's arbitration award against Cubic, and the Ninth Circuit has stayed briefing and any further proceedings on the cross appeals pending the resolution of this case. See Pet. 9. Added delay in resolving the lien issue will result only in further delay in the resolution of the cross appeals of the Cubic judgment.

There is no reason to impose such a burden not only on Mr. Elahi, but also on the courts to address a mere hypothetical concern of the United States as to what MOD "could" argue in the Iran-U.S. Claims Tribunal. See *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) ("if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate"). It may be cliche, but justice delayed is justice denied, or at least delay undermines Congress's intent. For this Court to follow the course of action advocated by the United States, however, would be to do just that.

III. The Ninth Circuit's Ruling That the Cubic Judgment Was a "Blocket Asset" Is Not Clearly Wrong.

Even if the United States had presented a concrete (as opposed to hypothetical) reason for this

Court's review of the Ninth Circuit's judgment, the predicate for such a review – that the Ninth Circuit's ruling is "clearly wrong" – is not correct. In its brief, the United States specifically takes issue with the statement of the Ninth Circuit in its amended opinion that "[f]ollowing release of the [U.S. Embassy] hostages, the United States unblocked most Iranian assets, ... However, military goods such as the ACMR remained blocked." Pet. App. 3.[1]

According to the United States, the Ninth Circuit's statement is wrong because in accordance with the Executive Orders issued by the President and the Treasury Department's implementing regulations, "any pre-January 19, 1981, property interest of petitioner [MOD] represented by the $2.8 million Cubic judgment was subject to the Executive Order and regulation requiring transfer to Iran of property owned by Iran on January 19, 1981, the date the [Algiers] Accords were signed, and was, for that reason, not blocked under IEEPA. E.O. 12,281; 31 C.F.R. 535.215." Amicus Br. at 13. Additionally, the United States argues that the Ninth Circuit's statement that "military goods such as the ACMR," were not unblocked by the President is not supported by

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[1] In these proceedings, MOD has taken the position that the Cubic judgment represents the "liquidation of a monetary amount of a military asset manufactured by Cubic and owned by MOD." Brief of Appellant at 31, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, No. 03-55015, filed April 10, 2003. That military asset is an air combat maneuvering range (ACMR).

the authority cited by the court of appeals. Brief of the United States at 14. The United States is incorrect on both counts.

First, the federal regulations implementing Executive Order 12,281 ordering the transfer to Iran of Iranian property applied only to "uncontested and non-contingent ... property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities." 31 C.F.R. § 535.333(a) (defining the term "properties" as used in 31 C.F.R. § 535.215(a)). Thus, property in which ownership was contested was not subject to the transfer order and, therefore, such contested property remained blocked. See *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 236 (D.Mass. 2006) (holding that the property in question (Iranian antiquities) remained blocked under Executive Order where the ownership of the property was contested). There is no dispute that MOD's ownership interest in the ACMR was contested by Cubic. This dispute is what prompted MOD to initiate the arbitration proceedings that resulted in the Cubic judgment. Hence, it is not at all clear, as the United States would have this Court believe, that MOD's pre-January 19, 1981 property interest in the ACMR, of which the Cubic judgment represents the liquidated monetary amount, was subsequently unblocked by the United States. In fact, the opposite is true.

Second, the Ninth Circuit did not rely upon misplaced authority in stating that following the Algiers Accords, certain "military goods such as the

ACMR remain blocked." Pet. App. 3. In particular, the Ninth Circuit cited to an official publication of the Office of Foreign Assets Control, Department of the Treasury, entitled *Foreign Assets Control Regulations for Exporters and Importers* (June 15, 2007) ("2007 Export Advisory"). With respect to Iranian assets, the 2007 Export Advisory specifically states that "[c]ertain assets" consisting "mainly of military and dual-use property . . . remain blocked in the United States." 2007 Export Advisory 23.

The United States contends that this statement from the 2007 Export Advisory "referred to specific assets as to which Iran has only a partial or contingent interest," and hence, it "has no bearing whatsoever on this case" Amicus Br. at 4. The United States cites no authority for its assertion that the language of the 2007 Export Advisory does not mean what it says, i.e., that "military and dual-use property . . . remain blocked."[2] There can be no dispute that the ACMR (of which MOD acknowledges the Cubic judgment represents the liquidated monetary amount) was such "military . . . property." Hence, far from being "clearly wrong," as the United States contends, the reasoning of the Ninth Circuit finds support in

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[2] The United States points out that the language in a subsequent version of the Department of Treasury's Export Advisory (Oct. 25, 2007) does not include the language cited by the court of appeals (Amicus Br. at 15, n.4), but this omission from a subsequent advisory does not establish that the statement in the 2007 Export Advisory is erroneous.

both the Treasury Department's blocking regulations and official publications.

CONCLUSION

Both the United States and MOD have failed to present any compelling reasons consistent with this Court's standards for the Court to grant certiorari in this matter. Therefore, Mr. Elahi respectfully requests that MOD's petition be denied.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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(5)

No. 07-615

FILED
JUN 04 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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DARIUSH ELAHI

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER

In its amicus filing ["U.S. Br."] made at the invitation of the Court, 128 S.Ct. 1332 (2008), the United States submits that both operative parts of the Ninth Circuit's decision – as to whether Respondent had relinquished his claim, and whether the Cubic judgment for which Elahi sought attachment was a blocked asset under the 2002 Terrorism Risk Insurance Act (TRIA) – were erroneous. Ministry of Defense (MOD) certainly concurs with these submissions, and takes no issue with the Solicitor General's recommendation, see U.S. Br. 11-15, to vacate the lower court's ruling that the Cubic judgment constituted a blocked asset, at least insofar as the law stood on the date of the Ninth Circuit's decision.[1]

Likewise, it is clear that further proceedings are required to determine whether the Cubic judgment is now a blocked asset under the State Department's October 25, 2007, designation of the Ministry of Defense and Armed Forces Logistics (MODAFL) under Executive Order 13382, as having allegedly engaged in activities relating to the proliferation of weapons of mass destruction. See 72 Fed. Reg. 71,991 (Oct. 25, 2007). Petitioner concurs with the United States, see U.S. Br. 16-19, that this question has never been

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[1] Notwithstanding Respondent's assertion in his Supplemental Brief in Opposition ["Supp. BIO"] 8 n.1, 10, MOD's position has been that the property being attached here is MOD's judgment against Cubic, which confirmed an arbitration award for breach of contract. See Pet. 25; Pet. Reply 4-5.

judicially determined and would need to be resolved, in the first instance, by the district court. MOD obviously reserves any and all arguments in relation to this issue.[2]

Despite these constructive submissions, the Solicitor General somewhat opaquely argues, see U.S. Br. 19-21, that the Ninth Circuit's decision on the relinquishment issue is unworthy of review. But allowing this matter to go unreviewed will perpetuate a split in the circuits on this question, and, more importantly, will have a profound practical effect on MOD's efforts (as well as those of other foreign sovereigns affected by the TRIA's relinquishment caveat) to resist unwarranted attachments of its assets in the United States, not the least of which is the Cubic judgment. Most seriously of all, however, is that if the Solicitor General's recommendation as to a disposition is accepted by the Court it will mean, as the United States appears to concede, U.S. Br. 20 n.6 (the Ninth Circuit's "error deprives judgment creditors who did not receive compensation and who have not relinquished their right to attach the Cubic judgment."), that Respondent will be suffered to attach an asset for which he has no right and no standing to pursue.

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[2] Indeed, in his filing, see U.S. Br. 9, the Solicitor General alludes to one factual dispute as to whether the proper nomenclature was employed in designating MOD and the responsible agency for the Cubic judgment, the Islamic Republic of Iran's Air Force (which was the named party on the contract with Cubic and the beneficiary of the ICC award). See Pet. 8.

The correct course for this Court is either to issue a summary disposition with an opinion reversing the Ninth Circuit's erroneous relinquishment ruling, or set that matter for plenary review. The suggestion for an unstructured remand without clear instructions to the court below is not appropriate, especially in light of the position taken here by the Solicitor General, and in view of the shifting grounds of disposition already seen in this case.

A. The TRIA Relinquishment Issue is Worthy of Review.

In its amicus submission, U.S. Br. 19-20, the United States concisely argues that the Ninth Circuit's holding – that Respondent had not relinquished his rights, under TRIA section 201(c)(4); Pet. App. 117, to the Cubic judgment – was clearly in error. Petitioner shall not rehearse here its earlier arguments that the Cubic judgment is "at issue" before the Iran-U.S. Claims Tribunal, within the meaning of that provision of the TRIA, see Pet. 16-23; Pet. Reply 1-3, or repeat the substance of Judge Fisher's dissenting opinion below. See Pet. App. 28-37.

The Solicitor General nonetheless suggests, U.S. Br. 20-21, that this matter is unworthy of this Court's review, both as to the gravity of the issue implicated (as reflected in circuit court schisms) and the "vehicular" characteristics of this case (as manifested in the parties' respective positions and prospects for future litigation). Petitioner is mindful that this Court does not, in the normal course, exercise its plenary

jurisdiction to correct errors in lower courts, no matter how egregious they might be. Petitioner submits here, despite the Solicitor General's intimations, that the TRIA relinquishment issue is worthy of correction and that MOD (along with other foreign sovereign agencies or instrumentalities similarly situated) stands to substantially benefit if the Ninth Circuit's ruling on relinquishment is either summarily reversed or set for argument.

1. Rather brusquely, the Solicitor General suggests, U.S. Br. 20-21 & n.7, that there is no real conflict between the Ninth Circuit's decision and that of other courts of appeals as to the scope of the "at issue" proviso in TRIA section 201(c)(4). Attempting to distinguish the *Hegna* line of cases, which have been litigated in no less than four other circuits, the United States suggests that "the property that the judgment creditor sought to attach was the precise subject of a claim by Iran against the United States in the Iran-U.S. Claims Tribunal." Id. As Petitioner previously briefed the Court, see Pet. 21-22, the *Hegna* multi-jurisdictional litigation involved attachments against properties that had previously served as Iranian consulates in Illinois, New York, Maryland and Texas.

It is true that "a claim filed by Iran against the United States in 1982, 'alleg[ed] that the United States had breached its obligations under the Algiers Declarations by failing to grant Iran custody of its diplomatic and consular properties in the United States'." *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000, 1008-09 (7th Cir. 2004) (quoting *Islamic Republic of Iran v. United States*, 33 Iran-U.S. Cl. Tr. Rep. 362

(1997), 1997 WL 1175789 (Cases A/4, A/7 & A/15)). To say (as the Solicitor General appears to) that the consular properties at issue in *Hegna* were "the precise subject" of Cases A/4, A/7 and A/15, is no distinction at all between the present controversy. As previously briefed, Pet. 16-18, Case B/61 before the Tribunal concerns, as President Clinton explained in a May 16, 1996 message to Congress, "a claim by Iran for compensation . . . to . . . military equipment that it did not receive . . . . because of the United States Government refusal to allow the export of the equipment after January 19, 1981, in alleged contravention of the Algiers Accords." Available at http://clinton6.nara.gov/1996/05/1996-05-16-report-on-national-emergency-with-respect-to-iran.html (visited June 2, 2008).[3]

Petitioner thus fails to see a rational distinction between the *Hegna* cases and the present controversy. And insofar as the United States concurs that the Ninth Circuit's judgment vastly constricts the scope of the TRIA's relinquishment caveat, see U.S. Br. 19 (citing Judge Fisher's dissent below, Pet. App. 32, which, in turn, cites for support *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004) ("rejecting narrow interpretation of 'at issue'")), 20 n.6 ("That does not mean that the relinquishment issue is of no moment.")), it seems beyond passing strange that

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[3] As Petitioner has previously noted, Pet. 17 n.2, MOD does not endorse in all respects this characterization of Iran's Claim in Case B/61, but it is illustrative of the subject-matter of the case.

the United States appears now to minimize the impact of this significant question of statutory construction.

Also left unremarked by the Solicitor General is that the very structure and thrust of the *Hegna* multi-jurisdiction litigation bodes ill for future cases against foreign sovereigns subject to the TRIA. Aggressive judgment creditors will seek to attach properties quite literally around the nation, hoping to arbitrage a favorable outcome and embarrassing the conduct of U.S. foreign policy. Unless corrected now, the Ninth Circuit's decision will undoubtedly be deployed to endorse such tactics.

2. That leaves the question raised by the Solicitor General whether MOD "would benefit in any practical way" by this Court's exercise of review on the TRIA relinquishment issue. U.S. Br. 20. The United States points to the presence of two other sets of attachments against the Cubic judgment as grounds for suggesting that Petitioner would gain only a pyrrhic victory by having Respondent Elahi's claim relinquished under the TRIA.

MOD would most certainly "benefit in a[] practical way" by vacating Respondent's attachment against the Cubic judgment. Petitioner would have a variety of substantive and procedural defenses against the Rafii and Rubin lienors, including estoppel, laches, and lack of compliance with the relevant federal statutory provisions for execution of judgment liens, that are not available against Respondent Elahi.

But even more significantly, Petitioner stands to benefit by this Court's exercise of review on the TRIA

relinquishment issue in relation to its other assets situated in the United States, quite apart from the Cubic judgment. Several cases are pending at this time concerning the attachment and disposition of Iranian antiquities in the United States, see, e.g., *Rubin v. Islamic Republic of Iran*, 541 F. Supp.2d 416 (D. Mass. 2008); *Rubin v. Islamic Republic of Iran*, 436 F. Supp.2d 938 (N.D. Ill. 2006), and bank accounts. See *Bank of New York v. Rubin*, 484 F.3d 149 (2d Cir. 2007). These cases may well be affected by this Court's determination that the Ninth Circuit's narrow construction of TRIA section 201(c)(4)'s "at issue" provision was erroneous. Additionally, other foreign sovereigns affected by the relevant provisions of the TRIA and 2000 Victims of Trafficking and Violence Protection Act (VTVPA), see Pet. 5-6; Pet. App. 107-11, have reason to see the relinquishment caveat fully enforced. Indeed, the United States makes clear in its submission that ensuring the integrity and coherence of its litigation positions before international tribunals (whether the Iran-U.S. Claims Tribunal or the International Court of Justice (ICJ)), is a significant foreign policy objective. See U.S. Br. 16-18; see also Amicus Brief of the United States, *Medellin v. Texas* (06-984), at 11-12 (March 22, 2007) (President's constitutional role "uniquely qualifies" him to resolve sensitive foreign policy decisions bearing on compliance with ICJ decisions).

3. That leaves the question of Respondent's standing, were the Court to adopt the Solicitor General's suggestion and leave the TRIA relinquishment issue unreviewed. In this respect, the

United States' brief suffers from some cognitive dissonance. On the one hand, it is forcefully argued that Elahi has relinquished his claim, and is essentially seeking to have the United States pay twice for his claims (once from Treasury funds, and again by way of set-off of an award at the Iran Claims Tribunal). U.S. Br. 20.[4] On the other hand, the United States seeks "not [to] prejudice respondent" with respect to the question whether the Cubic judgment is a blocked asset under the TRIA. Id. 18. Obviously, as the United States itself observes, see id. (I), 9, the relinquishment issue is logically anterior and alternative to the determination of the Cubic judgment's status as a blocked asset. If Elahi has relinquished his claim, it really does not matter to Respondent if the Cubic judgment is eligible for attachment.

Seen in this way, adopting the Solicitor General's recommendation would leave in place a lienor which, in the United States' own view, really has no standing to litigate the issue. Petitioner need hardly observe that a party's standing implicates Article III constitutional values of judicial self-restraint under the "case or controversy" requirement. See *Hein v. Freedom From*

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[4] In reply to Respondent's suggestion, Supp. BIO 4-5, that it is only "a remote, hypothetical concern" that Petitioner might use the Ninth Circuit's opinion as evidence of the United States' breach of the Algiers Accords, this Court can be assured that, as with any sovereign appearing before an international tribunal, the Islamic Republic of Iran will advance any arguments necessary and appropriate to vindicate its position.

Religion Foundation, Inc., 127 S. Ct. 2553, 2562 (2007); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (opinion of Kennedy, J.). The requisite elements of Article III standing are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Under this standard, if Elahi has relinquished his claim under the TRIA, any efforts on his part to enforce a lien against the Cubic judgment could not be entertained.

Many Justices of this Court have been on record, with respect to the prudential grounds for the grant or denial of certiorari or plenary review, that issues of constitutional standing are a significant consideration, especially in foreign relations cases. See, e.g., *City of Edmond v. Robinson*, 517 U.S. 1201, 1203 (1996) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from a denial of certiorari); *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Blackmun, J., joined by White, J., dissenting from an order vacating judgment) ("It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness. . . . I would set the case for oral argument and give it the plenary consideration it so obviously deserves.").

The Court should likewise decide here that the TRIA relinquishment issue is worthy of review: the Ninth Circuit's decision in this regard was manifestly erroneous, MOD stands (along with other foreign sovereigns) to substantially benefit if this error is corrected, and, in no event, should a party lacking

standing be allowed to maintain an action where it has no interest.

B. The Proper Disposition of this Case is Reversal.

In the previous incarnation of this matter, this Court observed that there have been shifting grounds of decision, which the court of appeals has quite freely used in reaching its legal conclusions. See 546 U.S. 450, 451 ("But [the Ninth Circuit] then found against the Ministry on a different ground – a ground that the parties had not argued."). As the United States has briefed, this has occurred yet again. U.S. Br. 9 ("Although no party had urged the distinction upon which the majority rested its amended decision, and neither petitioner nor the United States had an opportunity to respond to it, the court proceeded to deny the petition for rehearing. . . ."). And, even more disturbingly, the Ninth Circuit has, in the words of this Court's previous per curiam opinion, "committed error that was essential to its judgment in favor of respondent." 546 U.S. at 453.

The time for unstructured remands with no clear instructions for disposition, as the Solicitor General appears to urge, see U.S. Br. 21, are long past in this matter, if they were ever appropriate in a case involving sensitive foreign relations issues. Justices of this Court have recently been justly critical of such practices in precisely such a context. In *Medellin v. Dretke*, 544 U.S. 660 (2006), the Court dismissed as improvidently granted a petition raising significant

foreign relations concerns. In concurring with such a disposition, Justice Ginsburg (joined by Justice Scalia), expressed concern about any disposition that would "return the case to the Fifth Circuit with a bewildering array of questions," see id. at 669, and with "no clear instructions." Id. at 672. Taking a different tack, one group of dissenters to the DIG in *Dretke* likewise observed that "by vacating its judgment and remanding the case, we would remove from the books an erroneous legal determination that we granted certiorari to review." Id. at 693 (Breyer, J., dissenting, joined by Stevens, J.). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (granting review and disposing of case on grounds at variance with arguments advanced by the United States); Pet. 20-21 (collecting other foreign relations cases).

As already noted, simply GVR'ing this case – as the Solicitor General recommends – might be the proper disposition to deal with the intervening State Department designation and its effect on the status of the Cubic judgment as a "blocked asset" under the TRIA. But that assumes Elahi has not already relinquished his claim. The United States' reliance on this Court's guidance in *Lawrence v. Chater*, 516 U.S. 163 (1996), as to the proper use of the GVR disposition is fine as far as it goes to the effect of intervening federal administrative action. See id. at 167. But in light of the other considerations raised in *Lawrence*, "the equities of the case" counsel that this is not an appropriate instance for "a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary

review." Id. at 167, 168.

Given the United States' own contention that the Ninth Circuit's relinquishment decision was in error, U.S. Br. 19-20, the significance of such a ruling on Petitioner and similarly situated foreign sovereigns, and the problematic standing implications of allowing Respondent to nevertheless pursue his attachment, the proper disposition is to simply reverse the Ninth Circuit's decision on the TRIA relinquishment issue. This would – consistent with constitutional standing principles – allow another, proper, party-in-interest to assert before the district court that the Cubic judgment is a blocked asset, in light of the intervening State Department designation, and attempt to attach it. In this manner, and consistent with the United States' and Petitioner's position, such questions will be reserved for a another day.

CONCLUSION

The petition ought to be granted, and the decision below summarily reversed.

Respectfully submitted,

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June 4, 2008

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
APR 15 2008
OFFICE OF THE CLERK

No. 07-615

In the Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

DARIUSH ELAHI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether respondent relinquished any right to attach petitioner's judgment when he accepted payment under the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1541, thereby waiving his right to attach assets that are "at issue in claims against the United States before an international tribunal."

2. Whether the district court's 1998 judgment confirming a 1997 arbitral award in petitioner's favor is a "blocked asset" subject to attachment by respondent under the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2337.

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In the Supreme Court of the United States

No. 07-615

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

DARIUSH ELAHI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case presents two questions concerning whether respondent—a judgment creditor of the Islamic Republic of Iran—may attach an unrelated judgment in petitioner's favor. Although the United States strongly condemns the conduct of Iran that gave rise to respondent's judgment against it, the decision of the court of appeals is erroneous and threatens to undermine important governmental interests, including the proper functioning of the Iran-United States Claims Tribunal (Claims Tribunal or Tribunal) and the long-standing positions of the United States before that Tribunal. In addition, if upheld, the decision could subject the United States to mil-

lions of dollars in additional liability to Iran. At the Court's invitation, the United States filed a brief at the certiorari stage.

STATEMENT

1. In response to the seizure of American hostages in Tehran in November 1979, the President, exercising his powers under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701, 1702, "blocked all property and interests in property of the Government of Iran * * * subject to the jurisdiction of the United States." Exec. Order No. (E.O.) 12,170, 3 C.F.R. 457 (1980); see 31 C.F.R. 535.201. The hostage crisis was resolved through the Algiers Accords of January 19, 1981, 20 I.L.M. 224, in which the United States agreed to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." *Ibid.* The United States undertook, with certain exceptions, to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties." *Id.* at 227. The Accords established the Claims Tribunal at the Hague to resolve, *inter alia*, claims of the United States and Iran concerning the other's performance under the Accords. *Id.* at 230-232; see *Dames & Moore* v. *Regan*, 453 U.S. 654, 662-666 (1981).

On the day the Accords were concluded, the President directed the transfer to Iran of Iranian financial assets. E.O. 12,277-E.O. 12,280, 3 C.F.R. 105-112 (1982); see 31 C.F.R. 535.211-535.214. The President also directed that most other Iranian property be transferred to Iran "as directed * * * by the Government of Iran." E.O. 12,281, 3 C.F.R. 112 (1982); see 31 C.F.R. 535.215. Finally, the President lifted the earlier prohibitions

against transactions in Iranian property. E.O. 12,282, 3 C.F.R. 113 (1982). The Treasury Department implemented that order by issuing a general license authorizing "[t]ransactions involving property in which Iran" has an interest where: "(1) The property comes within the jurisdiction of the United States * * * after January 19, 1981, or (2) The interest in the property of Iran * * * arises after January 19, 1981." 31 C.F.R. 535.579(a).

2. Petitioner is the Ministry of Defense of Iran. Before the 1979 Iranian revolution, petitioner's predecessor contracted with a California firm, Cubic International Sales Corporation, subsequently Cubic Defense Systems (Cubic), to purchase an Air Combat Maneuvering Range (ACMR). Pet. App. 6; J.A. 21.

a. On January 19, 1982, Iran and petitioner filed two claims before the Claims Tribunal relating to Cubic: one against the United States solely (*Islamic Republic of Iran* v. *United States*, No. B/61 (*Case B/61*)); the other against both the United States and Cubic (*Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Int'l Sales Corp.*, 14 Iran-U.S. C.T.R. 276 (1987) (*Case B/66*)). *Case B/61* claimed, with respect to Cubic and other military suppliers, that the United States had violated the Algiers Accords by "bar[ring] the transfer to Iran" of military equipment. App., *infra*, 25a; 1 Claimant's Consolidated Submission 19-20, *Case B/61*; 3 *id.* Ex. 16 (Cubic contract).[1] *Case B/61* sought a decree requiring the United States to is-

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[1] The documents reprinted in the appendix to this brief were filed with the Claims Tribunal in *Case B/61* and *Case B/66*. The filings of Iran and of the United States relating to the Cubic claims have been provided by petitioner and the United States, respectively, to counsel for respondent.

sue export licenses for the military goods or compensation for what Iran had paid and consequential damages. App., *infra*, 31a, 43a. *Case B/66* sought the same relief as *Case B/61*, *id.* at 9a-10a, based on an allegation that Cubic had violated the 1977 ACMR contracts, and that the United States had violated its obligations by preventing Cubic from fulfilling the contract, *id.* at 2a.

On the United States' motion, the Tribunal dismissed *Case B/66* in April 1987, holding that it lacked jurisdiction over claims by petitioner against United States nationals and that the United States was not independently obligated to petitioner under contracts with Cubic. *Case B/66*, 14 Iran-U.S. C.T.R. at 277-278. In 1991, petitioner sought arbitration against Cubic in Switzerland before the International Court of Arbitration of the International Chamber of Commerce (ICC). See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Int'l Sales Corp.*, No. 7365/FMS at 7, *reprinted in* 13 Mealey's Int'l Arbitration Report (Oct. 1998) at G-4 (*ICC Award*).[2] The ICC claim requested the same relief—reimbursement for payments and consequential damages—as *Case B/61* and *Case B/66*. *Id.* at 11.

In response to Iran's Cubic claim in *Case B/61*, the United States noted that Iran had sought "recovery for the same Items at issue here" in *Case B/66* and that the same property was "currently the subject of an arbitration [petitioner] brought against Cubic before the [ICC]." App., *infra*, 48a, 50a. The United States urged the Tribunal to "await the decision of the ICC." *Id.* at 50a.

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[2] The *ICC Award* is Exhibit 3 to the Petition for Order Confirming Foreign Arbitral Award (No. 98-cv-1165), discussed at p. 5, *infra*.

b. The ICC rendered its award in May 1997. The arbitration panel found that in mid-1979, before Iran's assets were blocked and before Iran made the final payments for the ACMR, the parties reached a "common understanding that the Contracts would be *discontinued* and that Cubic would try to resell the equipment," with a later "settlement of the accounts." *ICC Award* 30, 37. "Depending on the result of the attempt to resell the System, either [petitioner] became entitled to be (partly) reimbursed for the payments it had made to Cubic, or Cubic became entitled to claim, in balance, an additional payment from [petitioner]." *Id.* at 48. In September 1981, Cubic sold to Canada a modified version of the ACMR, which was installed by October 1982. *Id.* at 52. After crediting petitioner's advance payments and Cubic's claims for compensation, the arbitrators awarded petitioner the balance, approximately $2.8 million, plus interest. *Id.* at 81, 84.

Cubic refused to pay, and Iran brought suit to enforce the award. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998), appeal pending, No. 99-56380 (9th Cir. filed Aug. 19, 1999). The district court confirmed the award on December 7, 1998, *id.* at 1174, and entered final judgment on August 10, 1999, Judgment (No. 98-cv-1165).

c. In July 1999, Iran filed its reply in *Case B/61*. See J.A. 73-86. Iran attached excerpts of the *ICC Award* and other documents from those proceedings. J.A. 85-86. To counter an anticipated defense, Iran contended that the *ICC Award* "cannot have a *res judicata* impact on the present Case" because *Case B/61* is based on "the United States' obligation under the Algiers Declarations to arrange for the transfer of the items to Iran" and

seeks compensation for "the losses suffered by Iran as a result of the United States' non-export of Iranian properties." J.A. 75-76. Iran recognized, nonetheless, that any amount it recovered from Cubic would "be recuperated from the remedy sought" against the United States. J.A. 76 n.2.

In rebuttal, the United States relied on the *ICC Award* and filings in petitioner's district court action to confirm that award. App., *infra*, 51a-82a. The rebuttal observed that "Iran has already received an award against Cubic for nearly $5 million [including interest] in reimbursement/compensation on its claims brought pursuant to these contracts," and that any further recovery "based on these same contracts would unjustly enrich Iran." *Id.* at 77a. The United States further argued that, "[i]f the Tribunal awards Iran any compensation on this claim, it must deduct the amounts that Iran has already been awarded for these Items by the ICC." *Id.* at 80a.

3. In 2000, Congress authorized the Secretary of the Treasury to make payments to certain individuals with terrorism-related judgments against Iran in suits brought under 28 U.S.C. 1605(a)(7)[3] to be paid out of rents received on Iranian diplomatic and consular properties, or undesignated United States Treasury funds (not to exceed the amount in the Iran Foreign Military Sales Program account). Victims of Trafficking and Violence Protection Act of 2000 (VPA), Pub. L. No. 106-386, § 2002(a) and (b)(2), 114 Stat. 1541, 1543. Those who accept payment under VPA relinquish certain rights, including their right to pursue compensatory damages

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[3] Congress recently replaced Section 1605(a)(7) with a new 28 U.S.C. 1605A. See 07-615 U.S. Cert. Br. 3 n.1.

and "to execute against or attach property that is at issue in claims against the United States before an international tribunal, [or] that is the subject of awards rendered by such tribunal." § 2002(a)(2)(B)-(D), 114 Stat. 1542.

The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2337, amended VPA in several ways. Congress expanded the class of individuals eligible for payment, § 201(c)(1), 116 Stat. 2337, but, because the funds originally identified might not be sufficient, Congress directed the Secretary to make pro rata payments to newly eligible persons, § 201(c)(4), 116 Stat. 2337. Congress limited the rights that must be relinquished by individuals who receive "less than the full amount of compensatory damage awards," but continued to require that they relinquish their rights of "enforcement against property that is at issue in claims against the United States before an international tribunal or is the subject of an award by such a tribunal." *Ibid.*; see 68 Fed. Reg. 8080 (2003).

In addition to amending VPA, TRIA authorized creditors with terrorism-related judgments to attach "the blocked assets of [a] terrorist party." TRIA § 201(a), 116 Stat. 2337. "[B]locked asset[s]" include "any asset seized or frozen by the United States" under IEEPA. TRIA § 201(d)(2)(A), 116 Stat. 2339.

4. In February 2000, respondent sued Iran and its Ministry of Information and Security under Section 1605(a)(7), alleging that those entities were responsible for the assassination of respondent's brother because of his opposition to the regime. *Elahi* v. *Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99, 103 (D.D.C. 2000). Defendants defaulted and the court awarded respondent

$11,740,035 in compensatory damages and $300 million in punitive damages. *Id.* at 115.

Respondent registered that judgment in the same court in which petitioner had confirmed the arbitration award against Cubic. In November 2001, respondent filed a notice of lien against petitioner's judgment against Cubic. Pet. App. 8. The district court rejected petitioner's contention that the Cubic judgment was immune from attachment, reasoning that petitioner had waived such immunity by invoking the court's jurisdiction to confirm the arbitration award. *Ibid.*

In 2003, respondent applied for and received payment of $2.3 million under TRIA in partial satisfaction of his judgment against Iran. Pet. App. 10. In accepting that payment, he signed an agreement "relinquish[ing] . . . all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal or that is subject to awards by such tribunal." Pet. App. 30 (quoting 68 Fed. Reg. at 8081).

5. Petitioner appealed the district court's holding that the Cubic judgment was subject to attachment, and the court of appeals affirmed. Pet. App. 38-80. The court of appeals rejected the district court's waiver analysis, *id.* at 59-63, but held that petitioner nonetheless was subject to the court's jurisdiction as an agency or instrumentality of Iran engaged in commercial activity, *id.* at 63-70. The court also rejected petitioner's argument that respondent's attachment of the Cubic judgment was not licensed under IEEPA. The court held that the Cubic judgment was not blocked because petitioner's "interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic," and that it was therefore

subject to the general license for transactions involving property in which Iran's interest "arises after January 19, 1981." *Id.* at 76 (quoting 31 C.F.R. 535.579(a)(2)).

Petitioner filed a certiorari petition. In response to the Court's invitation, 544 U.S. 998 (2005), the United States explained that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1604, affords greater protection from attachment to the property of foreign states than to the property of their agencies or instrumentalities and that petitioner—a ministry of defense—is an inseparable part of the Iranian state, rather than its agency or instrumentality. 04-1095 U.S. Amicus Br. 7-17. The Court vacated and remanded for further consideration of petitioner's status. 546 U.S. 450, 452-453 (2006).

6. a. On remand, a divided panel of the court of appeals again affirmed. 07-615 U.S. Cert. Br. App. 1a-30a (U.S. Cert. App.) (reproducing original opinion). On the FSIA issue, the panel held that petitioner is "an inherent part of the state of Iran" entitled to the greater immunity afforded to foreign states. *Id.* at 20a. Respondent contended, however, that he could attach the Cubic judgment on the alternative ground that it is the "blocked asset[]" of a terrorist party and therefore subject to attachment under Section 201(a) of TRIA. *Id.* at 11a. The court agreed, concluding that "no action by the executive branch has ever unblocked the assets in which Iran has an interest that antedates the Revolution, as its interest in the Cubic judgment does in this case." *Id.* at 15a.

The majority also rejected petitioner's argument, supported by the United States as amicus curiae, that the Cubic judgment is "at issue" in *Case B/61* and that respondent therefore relinquished his right to attach the Cubic judgment when he accepted $2.3 million under

TRIA "in partial satisfaction of his $11.7 million compensatory damages award against Iran." U.S. Cert. App. 6a-7a, 15a. The majority recognized that Iran seeks damages from the United States in *Case B/61* "based on the non-export of * * * the ACMR," *id.* at 8a, and that Iran had represented that it would "offset from its demand against the United States * * * any proceeds it receives from the Cubic judgment," *id.* at 9a. The majority nonetheless held that the Cubic judgment was not "at issue" in *Case B/61* because "the Cubic judgment * * * resolved Cubic's liability to Iran for non-delivery of the ACMR," whereas "Claim B/61 addresses what liability the United States incurred by failing to restore frozen Iranian assets, including the ACMR, as required under the Algiers Accords." *Ibid.*

Judge Fisher dissented. In his view, the Cubic judgment is "at issue" in *Case B/61* because it entitles the United States to an offset in that proceeding, and therefore respondent relinquished his right to attach the judgment by accepting compensation under TRIA. U.S. Cert. App. 26a.

b. Petitioner sought rehearing. The United States, as amicus curiae, explained that the court's holding that the Executive Branch failed to unblock any property in which Iran's interest antedated the Iranian revolution—which contradicted the court's earlier holding that the Cubic judgment was transferrable under the general license, Pet. App. 76—was incorrect and could seriously impair the United States' interests before the Claims Tribunal. Gov't C.A. Reh'g Amicus Br. 5-6, 8-11 (No. 03-55015).

The majority subsequently amended its opinion to delete the erroneous statement that the Executive Branch had never unblocked any property in which

Iran's interest antedated "the Revolution." Pet. App. 3; U.S. Cert. App. 15a. In new language, the majority recognized that "[f]ollowing release of the hostages, the United States unblocked most Iranian assets," but the court nevertheless held that "military goods such as the ACMR remained blocked," Pet. App. 3, a distinction no party had urged.

7. In October 2007, the Department of State designated the Iranian Ministry of Defense and Armed Forces Logistics—the same entity that is petitioner here, see pp. 31-32, *infra*—as an entity of concern with respect to the proliferation of weapons of mass destruction. 72 Fed. Reg. 71,991-71,992. The State Department made that designation under E.O. 13,382, 3 C.F.R. 170 (2006), which the President issued pursuant to his authority under IEEPA, *ibid.*; 72 Fed. Reg. at 71,991. The "property and interests in property" of petitioner therefore are now "blocked." 72 Fed. Reg. at 71,992.

SUMMARY OF ARGUMENT

Although the United States strongly condemns the killing that gave rise to respondent's action, the court of appeals' decision that Cubic's judgment is subject to attachment rests on a misinterpretation of TRIA and other errors of law, and accordingly should be reversed.

1. When respondent accepted payment under TRIA, in partial satisfaction of his judgment, he relinquished any right to attach property "at issue in claims against the United States" before the Claims Tribunal. The court of appeals' holding that the Cubic judgment is not "at issue" before the Tribunal is inconsistent with the plain meaning of that phrase and undermines the evident purpose of TRIA's relinquishment provision. Petitioner's claims against Cubic in the arbitration proceed-

ing and against the United States in *Case B/61* relate to the same losses Iran allegedly sustained from the termination of its contract with Cubic. While the theories of liability may differ, Iran has acknowledged that the Cubic judgment constitutes an integral part of the remedy it seeks against the United States in *Case B/61* and that its claim against the United States must be reduced by the amount of its recovery from Cubic. Under any reasonable construction, the Cubic judgment is therefore "at issue" before the Tribunal.

The court of appeals' contrary conclusion not only contravenes the text of TRIA but would frustrate the statute's purpose. TRIA was designed, *inter alia*, to prevent those who accept payment under that statute for their compensatory judgments against Iran from pursuing attachments that could undermine the United States' position before the Tribunal. Respondent's attachment, if upheld, would potentially subject the United States to millions of dollars in additional liability to Iran by eliminating property that could offset any judgment against the United States in the Tribunal. By accepting the $2.3 million under TRIA, respondent relinquished his right to attach property—like the Cubic judgment—that might be used to satisfy a judgment against the United States before the Claims Tribunal.

2. If the Court determines that respondent relinquished his right to attach the Cubic judgment, it should reverse without reaching the second question presented. If the Court does reach that issue, however, it should vacate the court of appeals' decision and remand with instructions to affirm on alternative grounds. The court's determination that the judgment was blocked because the United States never unblocked Iran's pre-1981 property interests in military equipment is errone-

ous and is contrary to the longstanding position of the United States, including its position before the Tribunal. The Cubic judgment is, however, now blocked as a result of the State Department's designation of petitioner as an entity of proliferation concern. That designation blocked all of petitioner's interests in property subject to the jurisdiction of the United States, including the Cubic judgment.

ARGUMENT

I. BY ACCEPTING PAYMENT FROM THE UNITED STATES, RESPONDENT RELINQUISHED HIS RIGHT TO ATTACH THE CUBIC JUDGMENT

A. The Cubic Judgment Is "At Issue" Before The Claims Tribunal

To help ensure that American victims of state-sponsored terrorism would receive "some measure of justice," 148 Cong. Rec. 23,121 (2002) (statement of Sen. Harkin), TRIA expands the class of judgment creditors eligible to receive payments from the United States for judgments awarded against "terrorist part[ies]." TRIA § 201(a), 116 Stat. 2337. As Judge Fisher observed, however, "TRIA's justice comes at a cost." Pet. App. 30. TRIA requires those who accept payment under that statute to relinquish the right to attach any property "at issue in claims against the United States before an international tribunal." TRIA § 201(c)(4), 116 Stat. 2339.

The threshold question presented by this case is whether the Cubic judgment is "at issue" in a claim against the United States in the Claims Tribunal. That boils down to a matter of statutory interpretation. Although neither VPA nor TRIA defines the term "at issue," its "ordinary meaning," *United States* v. *Santos*,

128 S. Ct. 2020, 2024 (2008), and statutory context, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006), make clear that the phrase encompasses, at the very least, situations in which the claim before the Tribunal relates to the same subject matter as the property attached, such that the Tribunal could be called upon to make rulings with respect to the property. The filings of Iran and the United States in *Case B/61* demonstrate that the Cubic judgment is at issue in that proceeding.

1. The phrase "at issue" is commonly understood, when used in connection with litigation, to describe matters that the tribunal may find it necessary to resolve in its decision in a contested proceeding. Dictionaries routinely define "at issue" as connoting "[t]aking opposite sides; under dispute; in question." *Black's Law Dictionary* 136 (8th ed. 2004); see *The American Heritage Dictionary of the English Language* 929 (4th ed. 2006) ("[i]n question; in dispute"). *Webster's* similarly defines "at issue" as "in a state of controversy: at variance: at a point where opposing viewpoints are held: in disagreement." *Webster's Third New International Dictionary of the English Language* 1201 (1993). Accordingly, property is "at issue" before the Claims Tribunal if it might reasonably be expected to be addressed in its decision.

That conclusion is further supported by the broader context of the relinquishment provision. A person who receives less than full payment under TRIA for his compensatory damages against Iran need not relinquish all the rights that the VPA required a recipient of full compensation to waive. See TRIA § 201(c)(4), 116 Stat. 2339. Significantly, however, TRIA *does* continue to require the recipient of partial payment to waive his right of "enforcement against property that is at issue in

claims against the United States before an international tribunal or is the subject of awards by such tribunal." *Ibid.*

Congress's use of the phrase "subject of awards" to describe the scope of relinquishment with respect to matters already adjudicated by the Tribunal is also significant. After the Tribunal has issued its award, the award's scope is fixed and determines what matters it actually resolves. See *Webster's* 2275 (defining "subject" as "something concerning which something is said or done: a thing or person treated of * * * <the [subject] of your essay>"). In contrast, when a claim is still in litigation, it is impossible to predict with certainty what the "subject of" the award will be, and so care must be taken not to interfere with anything that is "at issue" in the proceedings that the Tribunal may find it necessary to address in its decision.

Other statutes and court rules likewise employ the phrase "at issue" to describe matters that the court may be called upon to address in the course of adjudicating a case. Federal Rule of Civil Procedure 42(a), for example, permits consolidation of "any or all matters at issue in * * * actions" that "involve a common question of law or fact," which clearly implies that it is the "*question* of law or fact" that is regarded as being "at issue." *Ibid.* (emphasis added). Similarly, Congress has provided that "whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office [of Personnel and Management] is at issue in any proceeding" before the Merit Systems Protection Board, the Board must notify the Director of OPM, who may choose to intervene. 5 U.S.C. 7701(d)(1) and (2). The notice requirement under Section 7701(d)(2) is not limited to circumstances in which the MSPB will *necessar-*

ily address the application of a civil service provision in a definitive way, but extends to all cases in which a party has raised an argument that may lead the Board to interpret the civil service law or regulation in its decision. Cf. *Permanent Mission of India to the U.N.* v. *City of New York*, 127 S. Ct. 2352, 2356 (2007) (equating rights "in issue" in litigation, 28 U.S.C. 1605(a)(4), with litigation that "implicates" those rights).

2. The filings of Iran and the United States before the Tribunal make clear that the Cubic judgment is "at issue" in *Case B/61*. Those filings contain extensive discussion of the *ICC Award* as well as the district court order confirming that award. Both Iran and the United States have recognized that the Cubic judgment and *Case B/61* relate to the same injury claimed by Iran and that the Tribunal must therefore consider the *ICC Award* and Cubic judgment in deciding *Case B/61*.

That has been clear from the outset of the Tribunal proceedings. Iran's claims in each of the three proceedings sought the same monetary remedy: compensation of nearly $13 million for its payments on the Cubic contracts and damages of $15 million. See App., *infra*, 9a-10a (*Case B/66*); *id.* at 31a, 43a (*Case B/61*); *ICC Award* 11. When the United States moved to dismiss *Case B/66*, one of its arguments was that "The Subject Matter of Claim No. B/66 Is Already at Issue in Claim No. B/61." App., *infra*, 18a. Similarly, when the United States urged the Tribunal to delay consideration of the Cubic claim in *Case B/61* pending a ruling by the ICC, it explained that in *Case B/66* petitioner sought "recovery for the same Items at issue here," which "Items are currently the subject of a pending proceeding brought by [petitioner] before the ICC." *Id.* at 50a. Shortly after the ICC issued its award and petitioner filed its action

to confirm that award, Iran again recognized, in a letter from its Agent before the Tribunal to the United States Agent, that "the Awarded Amount constitutes an integral part of the remedy sought in Case B61." *Id.* at 85a.

Most significantly here, the parties have repeatedly stated that the Cubic judgment could affect the extent of Iran's damages and, in the view of the United States, whether Iran even has a valid claim in *Case B/61*. As early as January 1999, before the enactment of either VPA or TRIA, Iran's Agent recognized that, if collected, the Cubic judgment "is naturally to be recouped from the remedy sought against the United States in Case B61." App., *infra*, 84a. Similarly, Iran's Reply before the Tribunal noted that the amount of the Cubic judgment, "if received, will be recuperated from the remedy sought" against the United States. J.A. 76 n.2.[4] The United States' Rebuttal likewise observed that, "[i]f the Tribunal awards Iran any compensation on this claim [in *Case B/61*], it must deduct the amounts that Iran has already been awarded for these Items by the ICC." App., *infra*, 80a. Indeed, the United States went fur-

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[4] Iran contended, in its Reply in *Case B/61*, that the Cubic judgment did not bar its claim entirely under principles of "*res judicata*" because there was a variance in "subject matter." J.A. 75-77. Contrary to the views of the court of appeals (Pet. App. 13) and respondent (Br. in Opp. 18-19), that assertion does not constitute a concession that precludes petitioner from arguing that the Cubic judgment is "at issue" before the Tribunal. As discussed below, see pp. 21-23, *infra*, the standard for "res judicata," *i.e.*, claim preclusion, is not the same as whether a litigated judgment is "at issue" in a subsequent proceeding. Notably, Iran's Agent also recognized that distinction, because he made a similar assertion about the variance of "subject-matter" and inapplicability of "res judicata" in the very letter in which he stated that "the Awarded Amount constitutes an integral part of the remedy sought in Case B61." App., *infra*, 84a n.*, 85a.

ther, arguing that, because any compensation beyond the Cubic judgment would constitute unjust enrichment, "[t]he Tribunal should dismiss this claim in its entirety." *Id.* at 81a.

The Tribunal's award in *Futura Trading Inc.* v. *National Iranian Oil Co.*, 13 Iran-U.S. C.T.R. 99 (1986), demonstrates the manner in which the Cubic judgment is likely to become a "subject of" the award in *Case B/61* and is therefore "at issue" in that proceeding. In *Futura Trading*, the claimant brought a contract claim against Iran's national oil company, and the Tribunal upheld Futura's "contractual entitlement to the unpaid amount, *i.e.*, U.S. $416,321." *Id.* at 114 (¶ 56). Futura had, however, already collected a judgment in the same amount from Bank of America, premised on the latter's negligence in failing to obtain authority to pay Futura under a letter of credit. *Id.* at 115 (¶ 59). The Tribunal's award therefore held that "Futura has suffered no damage" and "no longer has a cause of action in the present proceedings." *Id.* at 116 (¶ 62). It is quite likely that the Tribunal's decision here will likewise address the Cubic judgment, and determine whether, and to what extent, that judgment reduces or eliminates Iran's claim. Accordingly, the Cubic judgment is "at issue" in *Case B/61* and respondent has relinquished his right to attach that judgment.

3. Moreover, allowing respondent to attach the Cubic judgment would frustrate the evident purposes of Congress in adopting the relinquishment provision. VPA and TRIA provide a mechanism by which certain judgment creditors of Iran may choose to accept payment from the United States for the value (or a pro rata share of the value) of their compensatory damages. VPA § 2002(a), 114 Stat. 1541; TRIA § 201(c)(4), 116

Stat. 2337. While some of the funds for such payments come from rents on Iranian diplomatic and consular properties, the vast majority of the funds comes from the United States Treasury. VPA § 2002(b)(2)(A) and (B), 114 Stat. 1543. Congress insisted that those who receive payments under VPA or TRIA should forego—in exchange for the funds they received—the right to engage in attachment proceedings that could increase the United States' liability to Iran in claims before the Tribunal or frustrate the United States' ability to recoup its payments through appropriate offsets. VPA § 2002(c), 114 Stat. 1543. Otherwise, the United States could be put in the position of paying twice, once directly, under TRIA, and once indirectly, by compensating Iran for the attached property.

Congress understood, as this Court also observed, that the treatment of "foreign assets" was a central feature of the Algiers Accords and that allowing individual claimants to impose "attachments, garnishments, or similar encumbrances" could create serious problems for the Nation's ability to implement its foreign policy. *Dames & Moore*, 453 U.S. at 673. Whereas *Dames & Moore* discussed how attachments could frustrate the President's ability to *negotiate* a resolution to the hostage crisis, TRIA reflects Congress's understanding that they can also frustrate the *implementation* of that resolution.

This case exemplifies the concerns that motivated Congress to insist that Iran's judgment creditors relinquish attachment rights to property at issue before the Tribunal as a quid pro quo of accepting payment under TRIA. Respondent applied for and accepted $2.3 million in TRIA funds. If respondent is permitted to successfully execute on the Cubic judgment, he could deprive

the United States of a defense against liability and would, at the very least, eliminate an offset and thereby increase by millions of dollars the amount the United States might be found to owe Iran. As Judge Fisher noted in dissent, Congress's "evident" intent in requiring relinquishment was to "prevent victims of terrorism who accept money from the federal treasury from attaching, executing on or making claims against property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals." Pet. App. 33.

In addition, the legal arguments respondent advances in support of the attachment could, if adopted, undermine the United States' position before the Tribunal. Respondent urges this Court to rule, as the court of appeals did, that the Cubic judgment is "blocked" on the ground that the judgment represents Iran's liquidated "interest in the blocked military asset, *i.e.*, the ACMR." Br. in Opp. 26-27. But, as noted below, see p. 28, the United States has argued before the Tribunal that Iran had no ownership interest in the ACMR as of January 19, 1981. And, because Iran had no title to the ACMR in January 1981, "the United States had no obligation to return that property to Iran under the Algiers Accords." App., *infra*, 70a. Acceptance by this Court of respondent's contrary arguments could undermine the United States' litigation position in *Case B/61*.

More broadly, petitioner states that it would regard a holding that its interest in the Cubic judgment is blocked (because it was never *un*blocked) as a "treaty default" by the United States under the Algiers Accords with respect not only to "the Cubic judgment, but a whole host of assets 'at issue' in *Cases B1*, *B61* and *A15* before the Claims Tribunal." Pet. Br. 54. Congress's

purpose in requiring relinquishment was precisely to prevent those who had accepted payment under TRIA from undertaking further attachments that might create such international disputes. Cf. *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 198 (1857) (avoiding interpretation of statute that would confer "a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government, or which might put it in [individuals'] power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations").

B. The Court Of Appeals' Reasons For Finding The Cubic Judgment Not "At Issue" Are Without Merit

In concluding that the Cubic judgment was not "at issue" before the Claims Tribunal, the Ninth Circuit relied on the fact that "Claim B/61 addresses what liability the United States incurred by failing to restore * * * the ACMR, as required under the Algiers Accords," whereas the Cubic judgment "resolved Cubic's liability to Iran for non-delivery of the ACMR" based on Cubic's "contractual obligations." Pet. App. 13. But TRIA's relinquishment provision depends not on an identity of parties or theories of liability, but on whether there is a substantive overlap between the attached property and the Tribunal proceeding.

The rule against double recoveries demonstrates that, contrary to the view of the court below, there need not be an identity of parties and legal theories for the judgment in one action to be at issue in a second proceeding. It is hornbook law that when two parties are jointly and severally liable for the same tortious injury, a recovery against one of the parties "diminishes the claim" against the other liable party. 4 Restatement

(Second) of Torts § 885(3), at 333 (1979). That rule applies equally when the two parties are liable under entirely distinct legal theories, such as when one party is liable to the plaintiff for breach of contract and another is liable for tortiously causing the first defendant's breach. *Id.* § 774A(2), at 55. "[S]ince the damages recoverable for the breach of the contract are common to the actions against both, any payments made for the one who breaks the contract or partial satisfaction of the judgment against him must be credited in favor of the defendant who has caused the breach." *Id.* § 774A cmt. e, at 56.[5]

As *Futura Trading* demonstrates, the Claims Tribunal follows the double-recovery rule. Indeed, the court of appeals here impliedly recognized that the Tribunal would have to take the Cubic judgment into account in *Case B/61*. The court noted that Iran claims that "the $2.8 million ICC award (which became the Cubic judgment) did not fully compensate [Iran] for Cubic's nondelivery of goods, and it seeks to recoup *the difference* from the United States." Pet. App. 12 (emphasis added). The court thus recognized that the calculation of damages in *Case B/61* would necessarily have to account for the Cubic judgment.

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[5] Even within the area of res judicata, to which the court of appeals referred, it is well established, under principles of issue preclusion, that the judgment in one case will be given effect in a subsequent suit in which the same right, question or fact is at issue, even though the second suit is "based on a different cause of action," *Montana* v. *United States*, 440 U.S. 147, 153 (1979)—and even, in many circumstances, when the party asserting the estoppel was not a party to the prior suit, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326-330 (1979).

II. IF THE COURT DETERMINES THAT RESPONDENT HAS NOT RELINQUISHED HIS RIGHT TO ATTACH THE CUBIC JUDGMENT, IT SHOULD VACATE THE COURT OF APPEALS' JUDGMENT AND REMAND WITH INSTRUCTIONS TO AFFIRM ON ALTERNATIVE GROUNDS

If the Court determines that respondent has not relinquished his right to attach the Cubic judgment, it should vacate the court of appeals' judgment, which is based on the erroneous determination that the Cubic judgment was blocked at the time the Ninth Circuit ruled, and remand with directions to affirm the attachment based on the State Department's recent designation of petitioner as an entity of proliferation concern.

A. At The Time The Court Of Appeals Ruled, The Cubic Judgment Was Not Blocked

1. The Ninth Circuit held—based on a theory not advocated by either party or the United States, and in an unexplained departure from its prior holding—that the Cubic judgment was blocked at the time of its decision because it represents an interest in military property that was never unblocked. That holding is mistaken and inconsistent with the United States' longstanding position. Because that erroneous holding, if not set aside, could adversely affect the Nation's foreign relations, this Court should vacate the judgment and remand with instructions to affirm the attachment on other grounds, if the Court does not reverse on the basis of relinquishment.

In its initial opinion, the court of appeals correctly held (Pet. App. 76) that the asset at issue here is petitioner's interest in the judgment it obtained against Cubic. The Treasury Department regulation implementing the relevant Executive Orders recognizes "judgments"

as a type of property that is distinct from "goods, wares, merchandise, [and] chattels." 31 C.F.R. 535.311; see *Estin* v. *Estin*, 334 U.S. 541, 548 (1948) (a "judgment is a property interest"). In its initial decision, the court of appeals correctly held that petitioner's "interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." Pet. App. 76. The court's initial ruling was also correct that "any transactions involving the Cubic judgment are authorized," *ibid.*, under the general license set forth at 31 C.F.R. 535.579(a)(2), which permits transactions in "property" in which Iran's interest "arises after January 19, 1981," *ibid.* Because transactions in the Cubic judgment were expressly authorized by the general license at the time of the court of appeals' decision, the judgment was *not* blocked and thus was *not* subject to attachment under TRIA at that time. See TRIA § 201(a) and (d)(2)(A), 116 Stat. 2337, 2339; *Bank of N.Y.* v. *Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (Properties "subject to the general license of 31 C.F.R. § 535.579[] are not blocked assets under the TRIA and therefore are not subject to attachment under that statute.").

After this Court vacated the Ninth Circuit's initial decision, and remanded with instructions to consider petitioner's status under the FSIA, the court of appeals reversed itself on the question when petitioner's property interest arose, without even mentioning its earlier holding. Pet. App. 19-20; cf. *id.* at 76. In its new opinion, the court concluded that the relevant property interest was Iran's pre-1981 interest in the ACMR, which, the court held, had never been unblocked following the Algiers Accords. Pet. App. 19-20. That conclusion was erroneous.

Respondent is not trying to attach the ACMR; that asset was sold years ago. Rather, respondent seeks to attach petitioner's 1999 money judgment against Cubic, which confirmed a 1997 arbitration award. As noted above, the regulations treat "judgments" and "merchandise" as distinct types of property, see 31 C.F.R. 535.311, and the "judgment" petitioner seeks to attach did not exist until 1999. Even if the regulation were ambiguous, the government's construction would be entitled to substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Because the judgment post-dates January 19, 1981, it is subject to the general license. See 35 C.F.R. 535.579(a).

Even if the Ninth Circuit were correct in focusing on Iran's interest underlying the Cubic judgment, rather than on the judgment itself, it *still* erred in concluding that the relevant interest pre-dates January 1981. Petitioner's claim in the arbitration proceeding was for breach of contract. As the *ICC Award* explains (at 66, 69), Cubic incorporated parts of the ACMR equipment in a subsequent sale of similar equipment to Canada, which occurred in September 1981. Whether petitioner was "entitled to be (partly) reimbursed for the payments it had made to Cubic" depended entirely on that resale of the equipment in September 1981. *Id.* at 48. Indeed, the ICC ruled that Iran's right to demand payment did not "mature[]" until October 1982, after Cubic had completely installed the Canadian system. *Id.* at 49, 52. After discounting for various costs and allowing for certain profits, the arbitration panel determined that, after the sale, Cubic owed petitioner approximately $2.8 million. *Id.* at 81, 84. The Cubic judgment thus represents petitioner's interest not in the military equipment itself, but in its share of the proceeds of the resale and installa-

tion of that equipment. Because petitioner's right to the proceeds arose after January 19, 1981, it was subject to the general license, and was not subject to attachment under TRIA at the time of the Ninth Circuit's decision, even if the proper focus of the inquiry were the property interest underlying the Cubic judgment.

2. What is more, even if the Ninth Circuit were correct in focusing on petitioner's *pre*-1981 property interest, the court was wrong to hold that that interest was not unblocked by the numerous Executive Orders and Treasury Department regulations promulgated following the Algiers Accords. See E.O. 12,277-12,281, 3 C.F.R. 105-113 (1982); 31 C.F.R. 535.210-.222. In particular, any pre-January 19, 1981, property interest of petitioner represented by the $2.8 million Cubic judgment was subject to the Executive Order and regulation requiring that property owned by Iran on January 19, 1981, be transferred according to Iran's direction. E.O. 12,281, 3 C.F.R. 112 (1982); 31 C.F.R. 535.215. Any such pre-1981 interest was, for that reason, not blocked under IEEPA, and therefore not "blocked" for purposes of attachment under TRIA, § 201(d)(2)(A), 116 Stat. 2339.

The court of appeals rejected that conclusion, holding that the Executive Branch has never unblocked "military goods such as the ACMR," Pet. App. 3, 19, a position no party had ever advanced and that the United States had no opportunity to refute. That holding is erroneous and contradicts the longstanding position of the United States.

In support of its conclusion, the Ninth Circuit cited, without explanation, the Arms Export Control Act, 22 U.S.C. 2751 *et seq.*; its implementing regulations, 22 C.F.R. Pts. 120-130; the President's 1979 Executive Order blocking Iran's interest in property, E.O. 12,170,

3 C.F.R. 457 (1980); a 2005 Presidential notice extending the national emergency with respect to Iran, 70 Fed. Reg. 69,039; and a Treasury Department brochure for exporters concerning foreign asset control regulations, Office of Foreign Assets Control, Dep't of the Treasury, *Foreign Assets Control Regulations for Exporters and Importers* 23 (June 15, 2007) (*2007 Export Advisory*). See Pet. App. 3, 19. None of the cited authorities supports the court of appeals' categorical conclusion that the United States failed to unblock Iran's interest in military property after the Algiers Accords.

The court of appeals' reliance on the Arms Export Control Act is misplaced. Although the Algiers Accords lifted restrictions the President had imposed on Iran's property pursuant to his IEEPA authority, certain property, such as military equipment, remained regulated under other statutes, such as the Arms Export Control Act, as it was on November 14, 1979. See 31 C.F.R. 535.215(c). But while those regulations may have prevented the export of military property to Iran, the property was not seized or frozen under IEEPA, and Iran was free to dispose of the property in other ways permitted by the regulations and thereby recoup its losses.

The court of appeals' reliance (Pet. App. 3, 19) on the 1979 Executive Order is similarly misplaced because it ignores the effect of the Executive Orders issued after the Algiers Accords. Those orders lifted prior restrictions imposed on property in which Iran had an interest. The 2005 Presidential notice that the court of appeals cited (*ibid.*) is also inapposite. It does not impose any new restrictions, but simply extended for one year the national emergency with respect to Iran. 70 Fed. Reg. at 69,039.

Finally, the court of appeals' reliance (Pet. App. 3, 19) on the *2007 Export Advisory* is misplaced. That advisory stated that there "remain blocked in the United States" "[c]ertain assets" consisting "mainly of military and dual-use property" that relate to claims "still being litigated in the Iran-United States Claims Tribunal" by "U.S. nationals * * * against Iran or Iranian entities for products shipped or services rendered before the onset of the 1979 embargo or for losses sustained in Iran due to expropriation during that time." *2007 Export Advisory* 23. While the *2007 Export Advisory* observes that "certain" assets, including "certain" military assets, in the United States remain blocked, it does not state that *no* property interests related to the military were ever unblocked.

Moreover, it is undisputed that the ACMR is not within the class described by the *2007 Export Advisory*. The ACMR is not "in the United States," having long ago been incorporated by Cubic into another system and sold to Canada. The *2007 Export Advisory* language on which the Ninth Circuit relied thus has no bearing whatsoever on this case. The court of appeals' analysis was, in any event, based on a faulty premise—that Iran had a pre-1981 "interest in the ACMR" as such. Pet. App. 20. As the United States has explained before the Tribunal, because the ACMR was never delivered, Iran never obtained an ownership interest in the ACMR itself. App., *infra*, 73a-74a. Rather, Iran retained an interest in the potential residual of the ACMR's sale, a right to payment that did not mature, as the ICC found, until *after* January 19, 1981. See *ICC Award* 49, 52.

3. In response to the United States' brief at the petition stage, respondent contended that the ACMR was not subject to the mandatory-transfer directive because

that directive applies only to Iran's "uncontested and non-contingent . . . property interests." Resp. Supp. Br. 9 (quoting 31 C.F.R. 535.333(a)). Respondent argues that Cubic contested petitioner's interest in the ACMR and that therefore that interest was not subject to the 1981 mandatory-transfer directive. *Ibid.* Respondent's argument misses the mark, because respondent is focusing on the wrong property. Section 535.333(a) relates only to property interests that pre-date January 19, 1981. See 31 C.F.R. 535.215(a), 535.333(a) (defining "[t]he term properties as used in § 535.215"). Because petitioner's interest in the Cubic judgment post-dates 1981, see pp. 23-26, *supra*, the "contested" provisions of 31 C.F.R. 535.333(c) do not apply.

But even assuming that the relevant inquiry concerns petitioner's pre-1981 property interest in its agreement with Cubic, that interest was not "contested" and therefore was not blocked after the promulgation of the Executive Orders and regulations that implemented the Algiers Accords. The *ICC Award* found that neither petitioner's nor Cubic's conduct through 1981 reflected an abandonment of their mid-1979 agreement that Cubic should sell the ACMR to a third party, with a subsequent accounting. *ICC Award* 33-40. Although Cubic and petitioner may have disputed the amounts each was owed following the 1981-1982 sale, petitioner's right to collect any money from Cubic under that agreement did not mature until after January 19, 1981. *Id.* at 52. The parties' dispute over the balance *after the sale* did not retroactively render the unblocked property blocked.

Notably, if respondent's contentions were correct, then the blocking order would have prohibited Cubic from selling the ACMR to Canada. Yet, the entire history of the parties' dealings presupposes that peti-

tioner's interest in the 1979 agreement was *not* blocked. Indeed, the fundamental legal and factual premise of the judgment respondent seeks to attach is that Cubic was carrying out the parties' agreement when it sold the modified system to Canada. Respondent cannot assert as the legal basis for his right to attach the Cubic judgment an argument that would, if accepted, negate the very basis of the judgment he seeks to appropriate.

B. The Cubic Judgment Is Now Blocked And Subject To Attachment Under TRIA

1. Although petitioner's interest in the Cubic judgment was not blocked at the time the court of appeals ruled, it is now blocked and therefore subject to attachment under TRIA. On October 25, 2007, after the court of appeals issued its amended opinion on remand, the Department of State designated petitioner as an entity of proliferation concern pursuant to authority exercised by the President under IEEPA. 72 Fed. Reg. at 71,991-71,992. As a consequence of that designation, "all property and interests in property" of petitioner "that are in the United States" are now "blocked." *Id.* at 71,992. Accordingly, because respondent is a creditor with a judgment under Section 1605(a)(7), see p. 7, *supra*, he may attach the Cubic judgment under TRIA, assuming he has not relinquished that right. See TRIA § 201(a), 116 Stat. 2337; TRIA § 201(d)(2)(A), 116 Stat. 2339.

2. Petitioner asserts that "[s]ubstantial fact issues would need to be resolved as to this matter, not the least of which is whether MOADFL is actually the same entity as petitioner." Pet. Br. 56. In its supplemental brief at the petition stage, petitioner contended that "further proceedings are needed to determine" "whether proper

nomenclature was employed in designating MOD and the responsible agency for the Cubic judgment, the Islamic Republic of Iran's Air Force (which was the named party to the contract with Cubic and the beneficiary of the ICC award)," Pet. Supp. Br. 1, 2 n.2—thus suggesting that petitioner will now dispute that it is a proper party to its own judgment. Petitioner's contention is meritless.

There is no plausible argument to support the suggestion that the Cubic judgment belongs to Iran's Air Force rather than petitioner. Whether or not Iran's Air Force was the named party to the contract with Cubic and a beneficiary of the *ICC Award*—but see Pet. 8 (stating that "the predecessor of the petitioner, the Ministry of Defense ('MOD') of the Islamic Republic of Iran, entered into a pair of contracts with Cubic Defense Systems, Inc.")—it was petitioner that initiated the arbitration proceedings, see *ICC Award* 2 (identifying "Islamic Republic of Iran acting through its Ministry of Defense and Support for Armed Forces" as a party to arbitration), and it was petitioner that sought to confirm the arbitration award in the district court, based on its representation that *it* had obtained the *ICC Award*, see J.A. 21. The district court reduced the arbitration award to a judgment in *petitioner*'s favor. J.A. 55-68; see Pet. Supp. Br. 1 n.1 ("MOD's position has been that the property being attached here is MOD's judgment against Cubic."). At the very least, petitioner is now judicially estopped from denying that it is the owner of the *ICC Award* and the judgment confirming it. See *Zedner* v. *United States*, 547 U.S. 489, 504 (2006).

Similarly, there is no doubt that the State Department designated petitioner in the Federal Register notice. In its amicus brief filed in this Case at the certio-

rari stage, the United States informed the Court that "[d]espite minor discrepancies in translation, petitioner is the same entity as the one designated" by the State Department. 07-615 U.S. Cert. Br. 9. An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quotation marks omitted). Petitioner identifies itself in this litigation as the "Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ('MODSAF-IRI')." J.A. 21. That nomenclature is consistent with "MODSAF," one of the abbreviations the State Department identified for the designated entity. See 72 Fed. Reg. at 71,992 (listing designated entity as "MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS (a.k.a. MODAFL; a.k.a. MINISTRY OF DEFENSE AND SUPPORT FOR ARMED FORCES LOGISTICS; a.k.a. MODSAF)"). The United States' interpretation of the Federal Register notice is thus not plainly erroneous and so controls. Nor does it matter that the government's interpretation of the Federal Register notice appeared in an amicus brief to this Court, a brief that was joined by the State Department, the agency that issued the notice. See *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008) (giving *Auer* deference to agency interpretation of regulation appearing in amicus brief).

Because the Cubic judgment is now blocked under IEEPA, it is subject to attachment by a qualifying party under Section 201(a) of TRIA.

CONCLUSION

The judgment of the court of appeals should be reversed on the ground that respondent has relinquished

his right to attach the Cubic judgment. If the Court concludes that respondent has not relinquished the right of attachment, the Court should vacate the court of appeals' judgment and remand with instructions to affirm the district court's attachment order on the basis of the recent designation of petitioner.

Respectfully submitted.

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Acting Solicitor General
GREGORY G. KATSAS
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SEPTEMBER 2008

APPENDIX

IN THE NAME OF GOD

THE MOST MERCIFUL, THE MOST COMPASSIONATE

[Symbol Omitted]

SUBMITTED TO THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
STATEMENT OF CLAIM
OF

No. B66

[Filed: Jan. 19, 1982]

Ministry of Defense of the Islamic Republic of Iran, of Iranian nationality, domiciled in Iran, at:

Sarhang Sakhaie Avenue,
Tehran, Iran

- AND -

1 - Cubic Corporation

2 - The Government of the United States of America, of United States nationality, domiciled in the United States, at:

* * * * *

1. General Nature and Legal Basis of the Claim:

Violation by Respondent 1 in fulfilling obligation related to contracts Nos. 134 and 134A dated 23 October 1997 for the sales of parts and installation, erecting, training and utilization of air combat systems for the Iranian Ministry of Defense and violation by the Government of the United States of America of its obligations as expressed in the Declaration of the Government of the People's Democratic Republic of Algeria dated 19 January 1981 and the prevention by the United States of the complete or partial fulfillment of the first Respondent's obligations.

2. Jurisdiction:

The present suit is under the jurisdiction of the Iran - United States Claims Tribunal at the Hague.

Although this Statement of Claim is related to a dispute between the Iranian Government and an American firm and, as such, appears to fall outside the jurisdiction of the Tribunal; however, with regard to the spirit of the Algerian Declaration dated 19 January 1981, the Government of the United States of America was obligated to provide all necessary facilities in order to settle disputes between real and legal entities mentioned in the said Declaration; whereas, regarding the disputes under the Contracts, not only have they not facilitated the settlement thereof, but they have actually hindered the performance of obligations by Respondent 1 (Cubic Corp.), who has explicitly and implicitly stated in its correspondence that the reason for the non-fulfillment of its obligations is the decisions taken by the Government of the United States of America. Hence, the Government

of the Islamic Republic of Iran, on the basis of the spirit of the Algerian Declaration, the indisputable and clear legal foundations of civilized nations and the Continental and Anglo-Saxon legal systems, recognizes the Government of the United States of America as responsible for preventing the obligee (Cubic Corporation) from fulfilling its commitments. In addition, due to the strong pressure of the American Government as overseer of Cubic Corporation's obligations, the Government of Islamic Republic of Iran sees the dispute between it and Cubic Corporation and the role of the United States as an indivisible unit and thus considers the Iran - United States Claims Arbitration Tribunal to have full jurisdiction to investigate this dispute.

It is hoped that the Tribunal, by expedience of its responsibility toward the history of international jurisprudence, and in the fare of humanity and history, will look at the indivisibility of the legal relations between the Iranian Government, Cubic Corporation and the American Government, and by accepting its jurisdiction, issue a worthy ruling.

3. Factual Background:

3.1 - Following the conclusion of military and non-military contracts between the Iranian Government at the time (prior to the Islamic Revolution of Iran) and the Government of the United States of America, which were all to the profit of the American Government and private American firms, two contracts as described below were signed with Cubic Corporation:

3.1.1 - Under Contract No. 134 dated 23 October 1997 concluded between the Deputy Minister of Defence for Armament and Cubic Corporation for the purchase of an air combat evaluation system and related spare parts, Respondent 1 was obligated to procure the parts related to the system as per the descriptions States in the contract and related annexes, and after completing the necessary inspections and test plan, to ready the same for shipment to Iran without delay or fault having been reassured of the manufactured parts' correct functioning. Respondent 1 was then obligated to deliver the goods F.O.B. San Diego, California after having informed Iran, in order that the system be transported to Iran, erected and installed for operation for air combat evaluation.

Respondent 1 was also obligated to begin manufacture of the said system within 30 days after signing the contract upon receipt of sums from the Iranian Government and to deliver the said systems to San Diego Harbor within 450 days after receipt of the 50 per cent advance payment.

According to existing documents, Respondent 1 once received from the Iranian Government the sum of US $9,034.355/- being 50 per cent of the total contract value as advance payment

and again, through letter of credit, the sum of US $3,630,684/–. Thus, Respondent 1 has received a total of US $12,665,019/– relating to this contract from the Iranian Government but has not fulfilled any of its obligations. In view of the fact that the manufacture, shipment, installation and readying the air combat evaluation system for operation are part of the obligations of Cubic Corporation according to the said contract, and that Cubic Corporation has received US $12,665,019/– out of the total contract price of US $18,012,170/–, that is Iran has fulfilled more than 70 per cent of its financial obligations while Cubic Corporation has failed to fulfill its obligations, the said Corporation has deprived Iran of the use of system under its obligation for which there exists the utmost need in conditions of war.

Since the said system is purchased for use in combat situations and is utilized to defend the country's territorial sovereignty, and since Cubic Corporation has refrained from fulfilling its obligations and the American Government has hindered the delivery of the said system's parts through boycott policies; the Government of the Islamic Republic of Iran therefore, demands that the American Government be obligated to lift the boycott and to provide for fulfillment of

obligations by Respondent 1, and strongly requests Cubic Corporation to perform its commitments.

3.1.2. - Because the said system and related parts purchased from Cubic Corporation has not been procured and delivered, the Government of the Islamic Republic of Iran has sustained the following losses and damages and requests compensation for the same:

- Restitution of the sum of US $12,665,019/- receivd from Iran in two parts (50 per cent advance payment in addition to the sum under the letter of credit).
- Interest accrued on the above amount at the rate of the U.S. prime rate calculated from 23 October 1997 till January 1982.
- The difference in the dollar parity rate in respect of the said amount payable in dollars at a sum determined by the Tribunal.
- The approximate amount of US $15,000,000/- as the minimum damages resulting from the American Government's decision preventing delivery of the purchased system at the most sensitive war-time period for Iran.

- The sum of US $10,000/– as expenses resulting from the presentation of this Statement of Claim.

3.1.3. - Substantiating evidences for this claim are as under:

- Copy of the original contract in 45 pages with amendments.
- Payment order and receipt of the sum of US $9,034,335/–.
- Bank document and receipt of the sum of US $3,630,684/– through documentary letter of credit.
- Letter No. 1358/3/22-102 from Engineer Yaghmaee, Representative of Cubic Corporation in Iran.
- Letter dated 30/2/1358 (20/5/1979), from Cubic Corporation's Iran representative stating that the above mentioned amounts have been received.
- Explicit and implicit admission by the Respondent and its representative, regarding the failure to transport and deliver the system to Iran.

3.2. - Contract No. 134A called for the installation and complete operation of the air combat evaluation system, its servicing and the preparing of its maneuvering range. According to this contract Cubic Corporation became obligated, on 23 October 1977, in

return for receipt of US $9,500,000/- from the Iranian Government, to perform the erection, complete servicing and preparation of the system, to deliver support equipment and to train personnel for the air combat evaluation system for Iran.

Respondent 1 drew US $302,857/- from the documentary letter of credit opened in the amount of US $1,913,310/- (Bank Markazi's letter No. 09/92459 dated 27/2/1358 (17/5/1979). According to part II of this contract, the Respondent's obligations comprised three main parts:

1) Preparation of the site,

2) Installation of the system, completion and flight test,

3) Operational training and maintenance,

However, none of the above were performed due to the fact that the equipment was not prepared and the system not delivered to Iran.

3.2.1. - Losses sustained due to the Respondent's failure to fulfill its obligations under this contract are as under:

Transportation, delivery and installation of the air combat evaluation system to Iran was not carried out on time.

3.2.2. - The demands of the Government of the Islamic Republic of Iran with regard to this contract are as follows:

- Restitution of the US $302,857/- drawn from the documentary letter of credit.
- Interest accrued on the above amount at the rate of the U.S. prime rate.
- Difference in the dollar parity rate payable in dollars at a sum determined by the Tribunal.

3.2.3. - Substantiating evidences for this claim are as follows:

- Copy of the original contract.
- Non-fulfillment of obligations under the first contract (4-1-2).
- Document showing payment (by the Claimant) and receipt (by the Respondent) of the sum of US $302,857/- (Bank Markazi's documentary letter of credit No. 09/92459 dated 27/2/1358 (17/5/79).
- Correspondence with the Respondent and its explicit and implicit admission concerning its failure to deliver, ship, install, and operate the system in a crucial period of Iran's war-time conditions.

3.3.1 - Total amount demanded under the two claims as detailed below excluding accrued interest and the dollar parity rate difference is US $27,922,876/-.

- Dollar amount received from Iran under the first contract US $12,665,019/-
- Dollar amount received from Iran under

the second contract US $ 302,857/-

total: US $ 12,967,876/-

Interest accrued on the above amounts at the rate of the U.S. prime rate to be determined by the Tribunal.

- The difference in the dollar parity rate to be determined by the Tribunal.
- Sum of various expenses relating to the claim US $10,000/-
- Minimum damages and losses resulting from the American Government's decision to prevent delivery of the system US $15,000,000/-

3.3.2 - Grand total excluding accrued interest and the dollar parity rate difference: US $27,977,876/-.

4. Relief Sought:

Requiring Respondent 1 to fulfill its obligations to deliver, install, and operate the air combat evaluation system, and to supply related spare parts; and requiring Respondent 2 (the American Government) to lift the boycott and to remove any and all obstacles imposed on Respondent 1.

5. Name and address of Claimant's attorney representative:

- Ministry of Defense of the Islamic Republic of Iran, Legal Section, Tehran.

6. Reservation of rights:

The Government of the Islamic Republic of Iran reserves the right to present further documents, evidence and legal financial or non-financial claims not included herein.

/s/ MOHAMMED SALIMI
MOHAMMED SALIMI
Staff Colonel

/s/ For. Col. Afrakhtoh
FOR. COL. AFRAKHTOH
Minister of Defense of the Islamic Republic of Iran

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Claim No. B/66
Chamber 1

THE MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN, CLAIMANT

v.

CUBIC CORPORATION, AND THE UNITED STATES OF AMERICA, RESPONDENTS

[Jan. 9, 1984]

REJOINDER OF THE UNITED STATES

JOHN R. CROOK
Agent of the United States

ELIZABETH J. KEEFER
Counsel

* * * * *

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
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Claim No. B/66
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THE MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN, CLAIMANT

v.

CUBIC CORPORATION, AND THE UNITED STATES OF AMERICA, RESPONDENTS

[Jan. 9, 1984]

REJOINDER OF THE UNITED STATES

On January 19, 1982, Iran's Ministry of National Defense filed Claim No. B/66 against the United States and Cubic International Sales Corporation (hereinafter "Cubic"). The United States filed its Statement of Defense on September 15, 1982. Claimant filed its Reply to the Statement of Defense on September 26, 1983. In accordance with the Tribunal's order of November 8, 1983, the United States submits this Rejoinder to claimant's Reply.

INTRODUCTION AND SUMMARY

In Claim No. B/66, claimant seeks specific performance of two contracts signed by the Iranian Ministry of Defense and Cubic in October 1977. Contract No. 134 (hereinafter the Cubic supply contract) provides for the design, manufacture, and delivery of equipment for an Air Combat Maneuvering Range (ACMR) system. Contract No. 134A (hereinafter the Cubic services contract) provides for installation and operation of the ACMR system in Iran. The Statement of Claim contended that Cubic failed to perform either the supply or the services contract. Claimant alleged that it paid Cubic two-thirds of the contract price for the equipment but never received any supplies in return. Claimant also alleged that Cubic drew on the letter of credit established for the services contract but provided no services at any point. The Statement of Claim also contained vague allegations to the effect that an alleged "boycott" by the United States Government prevented shipment of the Cubic equipment. Statement of Claim at 5. Claimant did not, however, charge the United States with violating any specific provision of the Algiers Accords.

On September 15, 1982, the United States filed its Statement of Defense, requesting dismissal of the claim for lack of jurisdiction over Cubic, a United States national, under the Tribunal's decision in Case No. A/2, and over the United States, since the U.S. Government was not a party to either of the contracts at issue. Moreover, evidence submitted by claimant and additional evidence appended to the Statement of Defense demonstrated conclusively that the reason for nonshipment of the ACMR equipment was the claimant's unilateral repudiation and breach of the Cubic contracts in May 1979.

Accordingly, any alleged "boycott" by the United States was irrelevant to performance of the contracts, which had been repudiated well in advance of the hostage seizure and the resulting disruption of relations between the United States and Iran.

Claimant's Reply, filed on September 26, 1983, contains no further evidence or arguments to support Tribunal jurisdiction in this case. While claimant concedes that the United States was not a party to the Cubic contracts (see Reply at 7, 8), it now alleges that the Tribunal has jurisdiction over this case as an official claim under Article II(2) of the Claims Settlement Declaration because the United States controls Cubic in some unspecified way. The Reply also asserts that the United States failure, after the entry into force of the Algiers Accords, to reinstate licenses permitting the export of the Cubic properties violates United States obligations under Paragraph 10 of the General Declaration.[1] The Reply thus alleges a new basis for jurisdiction over Claim No. B/66. According to the Reply, Claim No. B/66 is now a dispute "between the parties as to the interpretation or performance" of the Algiers Accords, and jurisdiction is found under paragraphs 16 and 17 of the General Declaration and Articles II(3) and VI(4) of the Claims Settlement Declaration. See Reply at 12, 16.

The United States respectfully renews its request that Claim No. B/66 be dismissed. Claimant's reformulation of its allegations in its Reply does not cure the jurisdictional defect in its contract claims against Cubic,

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[1] The Cubic export licenses were initially granted in May 1977 and September 1978 and subsequently renewed. The licenses were suspended, along with all other licenses for the export of Munitions List items, in November 1979 in response to the hostage crisis.

and fails to set forth a contract claim against the United States. Nor does the Reply set forth the factual basis for an interpretive dispute arising from the Cubic contracts. Moreover, any interpretive issues that the Reply may raise are already before the Tribunal in Claim No. B/61. Claim No. B/61 is Iran's general interpretive dispute concerning United States obligations to license the export of military equipment purchased by Iran from private United States suppliers. Because it is senseless to conduct parallel arbitration of United States obligations concerning the Cubic property in two separate cases, any interpretive issues raised here should be addressed in Claim No. B/61. The claim against Cubic should therefore be dismissed for lack of jurisdiction; the claim against the United States should be dismissed because the Tribunal has no jurisdiction and because it is wholly duplicative of another claim before the Tribunal.

ARGUMENT

I. Claim No. B/66 Should Be Dismissed Because It Is a Prohibited Direct Claim Against a United States National.

In its Reply, claimant continues to assert its contract claims against Cubic. The Tribunal has no jurisdiction over this purely private dispute, however. Cubic International Sales Corporation is a privately owned corporation organized under the laws of California. It is therefore a United States national as defined by Article VII(1) of the Claims Settlement Declaration. The Full Tribunal has already decided that it does not have jurisdiction over direct claims by Iran against United States nationals. See Decision of December 15, 1981, in Case No. A/2. The December 6, 1983 award issued by Cham-

ber Two in a claim somewhat similar to this one confirms that the Tribunal lacks jurisdiction over Iran's direct claims against private United States corporations that had contracted to supply military equipment to Iran. See *Ministry of National Defense v. The United States and FMC Corporation*, Award No. 88-A/14-2, at 3. In accordance with these decisions, the Tribunal should dismiss Claim No. B/66 insofar as it is directed against Cubic.

II. Claim No. B/66 Is Not a Proper Official Claim Because It Does Not Arise Out of Any Contractual Arrangements Between the Two Governments.

In an apparent attempt to make out a contract claim against the United States, the Reply alleges for the first time that Cubic is an entity controlled by the United States and that the two are "inseparabl[y] relat[ed]." See Reply at 14. Claimant has not substantiated and cannot substantiate this claim. In assessing whether there is government control of a corporation, the Tribunal has indicated that it will look to the nature of the government's ownership interest and to the extent of the government's right to overall management and direction of the company. *See, e.g., Rexnord, Inc.* v. *The Islamic Republic of Iran, et al.*, Award No. 21-132-3 (Jan. 10, 1983) (respondent corporations found to be controlled entities because Government of Iran had power to appoint and dismiss personnel in charge of their day to day management). The United States Government does not own any stock in Cubic and has never played any role in the management or direction of the company. Thus, Cubic is not a controlled entity within the meaning of Article VII(4) of the Claims Settlement Declaration. In

addition, as claimant now acknowledges, see Reply at 7, 8, the United States is not a party to the Cubic contracts. Accordingly, Claim No. B/66 is not an official claim over which the Tribunal can exercise jurisdiction under Article II(2) of the Claims Settlement Declaration.

III. The Subject Matter of Claim No. B/66 Is Already at Issue in Claim No. B/61 and Should Be Arbitrated in the Context of That Interpretive Dispute

Evidently because it cannot make out a viable contract claim against the United States, claimant attempts to create Tribunal jurisdiction by alleging in its Reply that the United States failure to reinstate export licenses for shipment of the Cubic equipment violates the General Declaration. Claimant has failed to establish any factual basis for an interpretive dispute, however. As discussed in detail in the Statement of Defense, any United States Government actions relating to export licenses are totally irrelevant to Iran's claims on the Cubic contracts because claimant repudiated its obligations under the contracts in May 1979, six months prior to the hostage taking and nearly one year before the breaking of diplomatic relations between Iran and United States. In short, claimant has not received the ACMR system not because the United States will not reinstate export licenses, but because claimant repudiated the contract and failed to pay the contract price for the equipment.

Even if, however, Claim No. B/66 does raise issues of interpretation or performance under the Algiers Accords, the issue of whether the United States is obligated to license the export of military equipment, *in-*

cluding the Cubic equipment is already before the Tribunal in Claim No. B/61. Claim No. B/61, though misdesignated as an official claim, is Iran's general interpretive dispute over United States obligations with regard to the transfer of military property purchased by Iran from private United States suppliers (i.e., military properties purchased outside the FMS program). Claimant has explicitly put Contract No. 134, the Cubic supply contract, at issue in Claim No. B/61.[2] See Exhibit 34 to the Statement of Claim in Claim No. B/61. There accordingly is no need for the Tribunal to address issues raised by the General Declaration in this case. Those issues are wholly subsumed by Claim No. B/61.[3] Hence,

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[2] Contract No. 134A, the Cubic services contract, has not been put at issue in Claim No.B/61. Contract No. 134A called for the installation, operation and servicing of the ACMR system by Cubic once the system was shipped to Iran. Although Iran has contended that none of the ACMR equipment was ever shipped (Statement of Claim at 5), any dispute concerning the United States obligation to license the export of these services should also be addressed in the context of Claim No. B/61.

[3] In Claim No. B/61, Iran bases its claim that the United States is required to license the export of the Cubic equipment on paragraph 9 of the General Declaration. Claimant's Reply in this case suggests that Paragraph 10 of the General Declaration requires the United States to authorize the export of the Cubic property. Regardless of whether Iran relies on paragraph 9 or 10 or both, the issue of the United States obligation with regard to the Cubic contract should be arbitrated in a general interpretive dispute.

Claimant's Paragraph 10 theory is, in any event, a makeweight. Paragraph 10 does not require the United States to take any action with respect to export licenses for military property. In Paragraph 10, the United States undertook only to "revoke all trade sanctions which were directed against Iran" in response to Iran's unlawful seizure of the United States Embassy in Tehran on November 4, 1979. Those trade sanctions were embodied in three specific executive decrees: Proclamation 4702

any interpretive issues raised in this claim should be referred to the Full Tribunal to be addressed in the context of Claim No. B/61, and Claim No. B/66 should be terminated in accordance with Article 34(2) of the Tribunal Rules. Cf. Order of October 20, 1982, Case Nos. 499 and 257 (Chamber 1) (terminating duplicative claim).

CONCLUSION

For the reasons discussed above, the Reply filed by the Ministry of Defense does not cure the jurisdictional deficiencies of the Statement of Claim. First, claimant cannot create Tribunal jurisdiction over Cubic. Its claim against Cubic should be dismissed as a prohibited direct claim against a private United States national. Second, claimant has not alleged a proper claim against the United States. The United States was in no way involved in the Cubic contracts. Thus, Claim No. B/66 is not an "official" claim under Article II(2) of the Claims Settlement Declaration. Further, any dispute regarding the United States obligation to transfer the Cubic equipment is already before the Tribunal in Claim No. B/61. Any United States obligation with regard to the issuance of export licenses for all Iranian owned military property should be arbitrated by the Full Tribunal within the context of a single interpretive dispute. The United States therefore renews its request that the Tribunal terminate Claim No. B/66 as duplicative in accordance with Article 34(2) of the Tribunal Rules.

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of November 12, 1979, Executive Order 12205, issued April 7, 1980 and Executive Order 12211, issued April 17, 1980. These trade sanctions did not pertain to export licenses for military property. Furthermore, the United States revoked each of these executive decrees with the issuance of Executive Order 12282 on January 19, 1981.

Dated: January 9, 1984

Respectfully Submitted,

/s/ JOHN R. CROOK
JOHN R. CROOK
Agent of the United States

By: /s/ ELIZABETH J. KEEFER
ELIZABTH J. KEEFER

NAME AND ADDRESS OF PERSON TO WHOM COMMUNICATIONS SHOULD BE SENT:

John R. Crook, Esq.
United States Agent
American Embassy
The Hague, The Netherlands

IN THE NAME OF GOD

THE MOST MERCIFUL, THE MOST COMPASSIONATE

[Symbol Omitted]

SUBMITTED TO THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE

STATEMENT OF CLAIM
OF

No. B61

[Filed: Jan. 19, 1982]

The Islamic Republic of Iran, Ministry of National Defense, of Iranian nationality, domiciled in Iran, at:

Deputy Minister for Legal & Parliamentary Affairs,
Sarhang Sakhaie Ave.,
Tehran - Iran.

CLAIMANT

AND

The Government of the United States of America, of the United States nationality, domiciled in the United States, at:

c/o Department of Defense, the Pentagon

IN THE NAME OF GOD

Statement of Claim

Iran - United States Claims Tribunal

In the Matter of the Arbitration Between:

The Islamic Republic of Iran, Ministry of National Defense, of Iranian nationality, domiciled in Iran, at:

Deputy Minister for Legal & Parliamentary Affairs,
Sarhang Sakhaie Ave.,
Tehran - Iran.

CLAIMANT

AND

The Government of the United States of America, of the United States nationality, domiciled in the United States, at:

c/o Department of Defense, the Pentagon
Washington, D.C. 20301
U.S.A.

RESPONDENT

A- LEGAL BASIS AND GENERAL NATURE OF CLAIM

On January 19, 1981, the Government of Democratic and Popular Republic of Algeria published two Declarations to the effect that the Iranian and United States Governments had agreed to settle their disputes through arbitration by Iran - U.S. Claims Tri-

bunal at the Hague. In view of the fact that in accordance with paragraph 17 of the Declaration, it is within the jurisdiction of the Tribunal to settle any disputes resulting from the interpretation of the Declaration, and that the Government of the United States has, on several occasions, violated the Declaration, inflicting substantial losses on the Iranian Government, the Claimant would like to draw the attention of the Honorable Tribunal to the following:

As provided by paragraph 9 of the above-mentioned Declaration, the United States has undertaken to arrange for the transfer to Iran of all Iranian properties located in the United States and abroad. As shown, however, by the substantiating evidence and documents attached to this statement of claim, the Respondent has, in effect, made no effort to implement the purport of paragraph 9 of the Declaration resorting to such pretexts as the U.S. laws applicable prior to November 14, 1979. The attached Exhibit No. 68 consisting of the U.S. Government letters to the Government of the Islamic Republic of Iran with respect to the properties belonging to Iran is submitted, herewith, for further information of the distinguished Tribunal. The qualification of "subject to the provisions of U.S. Law applicable prior to November 14, 1979, which has been included in the aforesaid paragraph, is in the Claimant's view, exceptionable and contrary to the spirit, subject-matter and purpose of the Algerian Declaration wherein the transfer to Iran of all Iranian properties was explicitly expressed.

Furthermore, it goes without saying that the Government of the United States did not sign the Alge-

rian Declaration with good-faith because while undertaking to arrange for the transfer to Iran of all Iranian properties, the Government makes sure of the inclusion in the Declaration of the loop-hole of "the Provisions of U. S. Law" to avoid abiding by the undertaking. In fact, the United States Government's discretion is according to the loop-hole, the sole guaranty for the fulfillment of the undertaking. This attitude is below the dignity of the countries committing themselves to do something and, as mentioned earlier, is contrary to the spirit and purpose of the Algerian Declaration. It should, also, be added that the acceptance by the Claimant of the qualification, which is contrary to fundamentals of international relations, does not authorize the Respondent to cause the Claimant to incur substantial losses by resorting to the provisions of the U.S. Law. In addition to the illegality just mentioned, the Respondent unilaterally sold the military properties belonging to Iran to the third parties further violating the Algerian Declaration. The actions taken by the Respondent to bar the transfer to Iran of the Iranian properties inflicted, both directly and indirectly, on the Claimant substantial losses amounting to billions of dollars.

The Honorable Tribunal is requested to bind the Respondent to compensate for the losses described in the "Relief Sought" section of the present Statement of Claim.

B- FACTUAL BACKGROUND

During the postwar period, the claimant became one of the major commercial buyers of the Respondent's

military products as a result of the latter's commitment to meet the defensive needs of the region. The parties to the present case, therefore, concluded many agreements in accordance with which the Respondent undertook to supply the claimant with arms and ammunitions. Accordingly both the Claimant and the Respondent made necessary and sufficient arrangements for the American private concerns to conclude and execute the related contracts, (by the necessary arrangements is meant the acquisition of necessary legislative authorization, the issuance by the U.S. Government of export licences and any other measures to facilitate the shipment to Iran of military equipment). Meanwhile, the Iranian Government paid for the purchased military equipment on a commercial basis. There are many cases in which the Claimant has already paid American private concerns for the military equipment, without having received the purchased equipment because of the Respondent's uncooperative action, namely, refusing to issue the export licences concerned.

The payments just mentioned amount to $2,264,733,652 (or Rls. 13,386,262,211) which the Respondent is bound to reimburse in addition to the losses incurred by the Claimant as described in the "Relief Sought" section of this Statement of Claim.

The payments were made, in most cases, in the form of Letters of Credit and/or of the order to the beneficiary's account, based on direct contracts including services, training, commercial and production contracts. Purchase order contracts in various forms were also used. During the execution of these contracts, the American parties thereof were instructed,

after the victory of the Iranian Revolution, by the Respondent to violate the contracts as described below:

1. The Claimant fully paid for many purchased military parts and equipment which were not transported to Iran.

2. The contracting parties that received the Claimant's military parts and equipment requiring repairs were instructed by the Respondent not to deliver the repaired parts and equipment.

3. Many projects under way in Iran which, directly or indirectly, related to the Iranian military industries could not get completed owing to non-delivery of the parts and equipment.

4. Many factories ceased operations and production because, as a result of the Respondent's refusal to issue export licences, they could not procure the required raw materials to be delivered by American private concerns.

5. Many properties belonging to the Claimant are currently warehoused in American ports and/or American companies unable to export the said properties to Iran, despite the fact that they are owned by Iran.

6. The advances paid by the Claimant to get the contracts executed were attached due to the Respondent's intervention. In some other cases, the Respondent somehow managed to bar the execution of the contracts for which the advance payments had been made by the Claimant.

7. The Respondent barred the exportation to Iran of the properties belonging to the Iranian Army and stored in the U.S. Army's bases and warehouses considering the useful life of some military equipment which has ended by now, the distinguish Tribunal can figure out the extent of losses inflicted by the Respondent on the Claimant.

8. Many parts previously bought by the Claimant and the exportation to Iran of which was barred by the Respondent, are complementary to military as well as non-military equipment purchased by the Claimant at the prices amounting to billions of dollars. Lacking the said parts, the equipment cannot be operated. Thus, the Claimant has to sustain considerable losses amounting to billions of dollars.

9. All the Iranian parts and equipment have been generally warehoused by the American private concerns demanding considerable storage charges from the Claimant. Given the fact that the Claimant did not want its own parts and equipment to be stored by the American private concerns, the storage charges were, in fact, imposed on the Claimant and the Respondent is bound to compensate for the charges the Claimant had no role therein.

10. Ministry of Defense invited its contracting parties to Vienna for negotiations and settlement of disputes, as provided for in Article I of the Algerian Declaration. Of 95 companies formally invited, 48 expressed their willingness for such ne-

gotiations in September and October, 1981. Negotiations were conducted with 35 companies with most of which our representatives arrived at agreements, in principle, for settlement of existing disputes. However, such settlements produced no results due to non-issuance of the required Export Licences for Iranian government-owned equipment. The companies argued that they would proceed to deliver the equipment provided, however, that the U.S. Government would properly issue the required Export Licences. Being dependent upon such condition, the negotiations could not produce the desired result, causing other companies, which had been, or which were to be, invited, to remain indifferent toward the results obtained. They believed the result would be the same even if agreements were arrived at in principle. Therefore, they did not show much interest in the continuation of such negotiations, with regard to the part of the U.S. Government as an inhibitory element. A further reason for the failure of the negotiations and suspension of agreements was that U.S. suppliers proposed to receive the total prices of equipment, but declined to commit themselves to the delivery thereof. The Government of Iran was quite willing to pay the equipment price provided, however, that the delivery of the equipment would somehow, be guaranteed. Such contradictions would adversely affect the negotiations, impeding a mutual agreement. Therefore, despite the explicit emphasis in the Algerian Declaration on settlement through face-to-face negotiations, as initiated by the Ministry of National Defense

(by direct telex communications or through the Algerian Ministry of Foreign Affairs), the passive attitude of the U.S. Government, as demonstrated by the fact that it clearly declares that it would not issue the required Export Licence) deviated the course of negotiations, caused failure thereof.

The position taken by the U.S. Government was not only an explicit violation of the Algerian Declaration and its obligations thereunder, but also resulted in substantial losses to Iran, and caused the filing of numerous litigations by American private institutions against the Islamic Iranian Ministry of Defense.

C- U.S. GOVERNMENT OBLIGATIONS TO IRANIAN GOVERNMENT

The principle of the Rule of Law as contained in the United States Constitution provides that all contracts entered into by U.S. Government are considered null and void unless ratified by both the Senate and the House of Representatives.

It should be noted that all military contracts entered into between the Iranian and U.S. Governments have somehow been ratified by both Houses prior to implementation, and, as such, the U.S. obligations to Iranian Government are not only sanctioned by the Houses, but are considered as the U.S. Government International Obligations. It is based on such sanctions that the U.S. Government proceeded to conclude military contracts and to forward military or military equipment to Iran. Similar contracts signed

by U.S. private companies have been executed under U.S. Government control and authorization, and are, thus, considered legally binding obligations not only in accordance with the United States internal laws but also with the international law and treaties, the execution of which have been recommended by international organizations.

The Committee for International Law defines a contract as follows (as translated from English text):

Any international agreement executed in writing, signed in one or more international versions, of the nature of the contract, convention, protocol, proclamation, bill, declaration etc., and signed by two or more countries, shall be subject to international law and shall be governed thereby (the definition as proposed by the Committee has been adopted under Part A, para. 1, Article II, of Vienna Law of Treaties Convention).

D- RELIEF SOUGHT

In view of the foregoing, an award is requested to bind the U.S. Government to:

1. Issue Export Licences for Iranian government-owned goods and equipment as detailed in Exhibits attached herewith.

2. Pay a sum of U.S. $2,264,733,652.– as well as Rials 13,386,262,211.–, representing the purchase price of such goods and equipment – in case the U.S. Government refrains from the issue of such Export Licences for any reason whatsoever including restrictions imposed by its internal laws.

3. Pay, in addition to the sum under 2 above, the difference excess between rates prevalent at the time of purchase and the execution of award.

4. Pay the proceeding costs as well as other direct, indirect and subordinate losses sustained to the date of the award, as detailed in Exhibits or as deemed reasonable and just by the Tribunal.

5. Pay attorneys' fees, i.e. US $100,000.–.

6. Pay Administrative expenses, translation and reproduction costs US $40,000.–.

E- EXHIBITS

For the information of the Tribunal, the Exhibits relating to various units and commands of the Islamic Republic of Iran, Ministry of Defense are attached herewith, detailing losses and reasons therefor. The Claimant reserves the right to add more exhibits, as required. Losses sustained by various units and commands of the Islamic Republic of Iran, Ministry of Defense are as follows:

SECTION I

a) [REDACTED]

1. Exhibit 10

Repairable parts (30 pages): a list of parts sent to U.S. for repair and not yet returned; valued at approximately Rials 9,608,292,454.–.

2. Exhibit 11

Items for which price has been paid; valued at approximately $100,000.–.

3. Exhibit 12

   Items purchased from [REDACTED] not yet delivered; valued at approximately $773,584.39.–.

4. Exhibit 13

   Items which suppliers were obligated to deliver; valued at approximately $40,009,000.–.

5. Loses to capital stagnance.

6. Loses arising from increase in price due to non-delivery of parts.

7. Losses resulting from nullification of contract by suppliers, computed as being equivalent to the remaining portion of the contract price

8. Direct and indirect losses due to non-delivery of parts by suppliers and resulting non-operational position of our helicopters.

9. Losses in capital and personnel, based on the report of our "Finance Committee, i.e. $3.75 for each dollar invested.

b) [REDACTED]

1. Losses in respect of [REDACTED]
   [REDACTED]
   [REDACTED]
   [REDACTED] detailed in Table P-18 (attached).
   Total $41,776,361.–.

2. Losses in respect of contract 73/53 (Exhibit 14), Total $237,099.–.

c) [REDACTED]

c.1. Losses sustained in respect of contract with [REDACTED] (Exhibit 20):

1. Total price of items not delivered $12,314,046.76.

2. Interest (at international rates) up to the date judgment is passed and put into effect.

3. Difference in prices of above items at time of purchase and date of final award.

4. Losses sustained - equivalent to total price of undelivered items. Non-delivery of the items caused delay in project implementation, non-utilization of machinery and parts already purchased for the purpose under contracts with [REDACTED], gradual wear of equipment, and finally, delay in the [REDACTED] repair projects and installations.

5. Cost of maintenance and repair of the afore-mentioned machinery and equipment having been idle due to non-delivery of parts, total $ 5,000,000.–.

c-2. Losses sustained in respect of contracts with company (Exhibit 22):

1. Advance payment	$	761,343.–
2. Payment for phase I	$	40,080.–
3. Payment for phase II	$	36,881,360.–

4. Payment for phase VII $ 10,395,920.–

5. Increase in price of undelivered items $ 1,395,920.–

6. Interest for items 1-5

c-3. Losses sustained in respect of contract with [REDACTED] Company (Exhibit 23):

1. [REDACTED] $ 20,000.–

2. [REDACTED] [REDACTED] $ 1,500.–

3. [REDACTED] [REDACTED] $ 1,400.–

4.a. [REDACTED] [REDACTED]

b. [REDACTED]

c. [REDACTED] [REDACTED] [REDACTED]

Total: $ 319,300.–

5. In view of the fact that due to non-completion of the [REDACTED] by the said company and failure in complete shipment of the items and tools under contract and, in general, failure in installation of monitoring system for all [REDACTED]s [*sic*], great losses have been inflicted, due to failure in timely implementation of [REDACTED] to the existing

systems and equipment, the total of which amounts to $ 3,609,382.–.

c-4. Losses incurred in respect of the contract concluded with **[REDACTED]**y [*sic*] as per attachment (Exhibit 25). These items have been ordered to **[REDACTED]** in respect of the project for installation of **[REDACTED]**. But so far only a number of items valuing $ 3,092,279.74 have been shipped to Iran, which under the present circumstances, are not utilizable. Therefore, the following sums are claimed as loss, by **[REDACTED]**:

1. Value of all items equaling $4,588,431.75.
2. Interest of the sums paid to the company (equaling $309,227,974) on the basis of prevailing rate, up to the date of presentation of this statement of claim.

c-5. Losses sustained in respect of the contract concluded with **[REDACTED]** as per attachment (Exhibit 26) :

1- Due to failure of the named company to carry out its commitments: $12,524,642.04–.

2. Due to non-delivery of the goods by the said company: Rls. 5,170,610.

3. Value of items not delivered: $4,929,543.16.

4. As against the services not carried out: Rls. 522,307,257.

c-6. Losses incurred in respect of nine contracts concluded with **[REDACTED]** as per attachment (Exhibit 24).

1. Due to non-utilizability of the items incompletely shipped to Iran by the comapny, the total value of transaction equalling: $2,336,486.

2. Interest accrued to the sums paid to the company equalling $1,860,194.95.

3. A loss for the delay in shipment of the spare parts to the **[REDACTED]** equalling $50,000.–.

c-7. Losses incurred in respect of the contract concluded with **[REDACTED]** as per attachment (Exhibit 21):

1. Total value of the items sent to U.S. for repair equalling $45,000.–.

2. Losses sustained by **[REDACTED]** ue to failure in timely shipment of the above said items equalling: $ 50,000.–.

d) **[REDACTED]**:

By virtue of the Agreement concluded, **[REDACTED]** against current receipts from the Government of Iran, have purchased goods and have sent one copy of the purchase order to Iran. The total of purchase orders not shipped to Iran due to non-completion of construction are as follows:

Ser.	No. of purchase Orders	Type of Property	Total Sum in US $
1	790	[REDACTED]	21,578,600
2	540	[REDACTED] [REDACTED]	10,021,715
3	570	[REDACTED] [REDACTED]	930,560
4	77	[REDACTED]	76,510
5	11	[REDACTED] [REDACTED]	63,270
Total No. of Orders	1988		US $32,760,655

Meanwhile, a number of 1215 purchase orders valuing $44,605,910 has been placed by [REDACTED] [REDACTED] [REDACTED]. But the said orders have not been shipped to Iran. Besides, since the factory has not yet been completed and delivered, the total amount claimed by this company is equal to three hundred million dollars ($300,000,000) which is equivalent of the total payments made to [REDACTED].

e) Losses incurred by [REDACTED]

According to the contract concluded between the Defense Ministry and the [REDACTED], the referred companies undertook to install and make available for utilization the [REDACTED] [REDACTED].

[REDACTED]
[REDACTED].

1. The sum paid for the said equipment is forty million dollars ($40,000,000).

2. According to terms of the contract concluded, the responsibility for installation and sitting into operation of the said equipment was upon the above-named companies, but due to failure in shipment of spare parts and accessories and failure in sending the expert personnel,
[REDACTED]
[REDACTED].

3. Should the mentioned equipment have been installed and set to work, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] export of goods to Iran, the following losses have been incurred:

   i) The value of goods and shipment freight at forty two million dollars ($42,000,000).

   ii) Value of the [REDACTED]
   [REDACTED]
   [REDACTED]
   [REDACTED]
   [REDACTED] ($125,000,000).

   iii) [REDACTED]
   [REDACTED]
   [REDACTED]
   [REDACTED]

[REDACTED]
[REDACTED]
$192,000,000.–.

f) Losses incurred by [REDACTED] [REDACTED]:

1. [REDACTED]
[REDACTED]
[REDACTED]. This amount covers the machinery and equipment, as well as the technical literature concerning the production of [REDACTED].

2. On the basis of the contract concluded with [REDACTED], the said company have undertaken to ship [REDACTED]
[REDACTED], in the first stage, and a further 100 for the second stage, [REDACTED], to this company. A contract for [REDACTED] has been concluded, but the above-named company have sent only [REDACTED]
[REDACTED]. The above-said company, through telex dated September 1979, attachment (Exhibit 17) declared that due to non-issuance of export licence for the goods in question it is not able to perform its obligations. As a result of this action of U.S. Government, the [REDACTED]
[REDACTED] were never delivered. The material and moral losses sustained due to this failure amounts to twenty million dollars ($20,000,000) in total [REDACTED]
[REDACTED] war
[REDACTED].

3. In execution of the project for purchase of spares and services from [REDACTED], the said company have shipped, for each [REDACTED] [REDACTED], 589 launching units. Against the failure in full execution of this contract, [REDACTED] [REDACTED] claims an amount of ten million dollars (10,000,000.–) as material and moral loss.

4. In respect of the contract for the purchase of installation services concerning main premises of this company's factories at [REDACTED] with [REDACTED], this company has paid a total of twenty one million and six hundred thousand dollars (21,600,000.–) to the said company, in execution of the mentioned project. Of a total of twenty million dollars valued installation equipment, only twelve million dollars (12,000,000) have arrived to this company and the remaining equipment are being kept in a storehouse in [REDACTED], for which an amount of $200,000.– has been paid as storage cost, so far. In addition, due to non-availability of the required parts and tools, the main premises of the company have, after expending of a sum of two thousand five hundred million dollars ($2,500,000,000.–) remained totally unusable. Thus, in consideration of all aspects of the matter, due to non-utilization of the referred to premises, the amount of loss incurred amounts to fourteen million dollars ($14,000,000.–).

g) Losses sustained by [REDACTED]

1. Against non-shipment of the parts and goods remaining with the U.S. Companies, as per attach-

ment (Exhibit 15): a total amount of $139,350,000.–.

2. Photocopy of the Agreements reached with United Technology. Despite the conclusion of the contract between the above named company and **[REDACTED]**, the Government of the United States has refused to execute this Agreement as per attachment (Exhibit 16).

3. Photocopy of the letter of "**[REDACTED]**, purporting the issuance of export licence for the goods. However, the U.S. Government has refused to issue licence for export of the goods belonging to Iran, as per attachment (Exhibit 17).

h) Losses incurred by the Air Force of the Islamic Republic of Iran:

The Air Force of the Islamic Republic of Iran concluded various contracts with U.S. Companies in order to make use of their services in different sections. List of these contracts and names of the contracting companies, as well as total of losses incurred and the interest accruing thereto, are reflected in the table contained in attachment (Exhibit 31) annexed hereto. The total sum of these losses amounts to $430,548,648, inclusive of the interest accrued, calculated up to the date of formulation of this statement of claim.

Meanwhile, attachments Nos. (Exhibit 32, Exhibit 66), contents of contracts and other documents, are presented to the Arbitration, for consideration thereof.

i) Losses Incurred by the [REDACTED]
[REDACTED]
[REDACTED]

Payments made by [REDACTED]
[REDACTED]
[REDACTED], have amounted to $192,421,601.- . This project was left uncompleted and basically was not carried out by U.S. Comapnies. Moreover, the losses incurred in Rial equivalent has totalled three hundred and eighty five million, two hundred and forty five thousand and nine hundred and forty five Rials (Rls. 385, 245,945.--) the documents and substantiating evidence of which shall be presented to the Arbitration Tribunal in due course.

PART TWO:

The points and cases which should be considered in determining the amount of losses by the honorable arbitrators are as follows:

1. Losses due to increase in universal prices of goods not delivered in due time to Iran, which if purchased or procured now by the Defense Ministry of the Islamic Republic, a price several times as much of their real value in time of conclusion of contract will have to be paid.

2. Losses due to unilateral cancellation of contract, as a result of the act of U.S. Government, and in which the Claimant has had no role whatsoever.

3. Losses incurred, directly or indirectly, as a result of the Respondent's failure in delivery of parts and machinery, by claimant.

4. Losses in terms of finance and personnel. In many cases the Claimant has paid unjustifiable sums for uncompleted projects for several consecutive years.

5. Probable losses concerning that part of documents and supplements which in case of necessity, shall be added to this statement of Claim and presented to the Arbitration Board.

6. In view of the cases of loss which should be taken into consideration, the Claimant requests that the interest accruing to the amounts of losses be calculated on the basis of 22% per annum from the date of formulation of each of the contracts and the occurrence of the expenses up to the date of the formulation of this statement of claim, plus the losses and the accruing interest at the same annual rate from the date of presentation of this Statement of Claim up to the issuance of award and execution thereof.

7. Meantime, the Claimant requests an amount of one hundred thousand dollars ($100,000.–) as litigation costs and the overall expenses relating thereto.

8. Name and Address of the Attorney/s who shall be responsible for the defense of this Statement of Claim in the Arbitration Tribunal:

9. Name and address of the person to whom all correspondence concerning this litigation should be sent:

Staff Colonel- Mohammed Salimi

Minister of Defense of the
Islamic Republic of Iran.

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Case No. B/61
(including Case Nos. A/3, A/8, A/9, and A/14)

ISLAMIC REPUBLIC OF IRAN, CLAIMANT

v.

UNITED STATES OF AMERICA, RESPONDENT

Full Tribunal

CONSOLIDATED RESPONSE OF THE UNITED STATES: PART I RESPONSE TO LIABILITY CLAIMS BY COMPANY

VOLUME 6 OF 10

D. STEPHEN MATHIAS
Agent of the United States

CONRAD K. HARPER
MICHAEL J. MATHESON
JUDITH L. OSBORN
SHARON E. CONAWAY
Counsel

CUBIC

[Symbol Omitted]

RESPONSE TO LIABILITY CLAIMS: CUBIC

In its claim relating to Cubic Corporation, Iran seeks compensation for property that is currently the subject of an arbitration Iran brought against Cubic before the International Chamber of Commerce, International Court of Arbitration (the "ICC"). The Tribunal should await the decision in that case before proceeding with respect to Iran's claim here.

FACTS

The United States understands Iran's claim relating to Cubic to be for subsystems and support equipment (The "Items") comprising an Air Combat Maneuvering Range (the "ACMR"), a customized electronic air combat training system to be used by the Imperial Iranian Air Force ("IIAF"). These items are listed on documents that Iran submitted with respect to Cubic. Iran's Consolidated Submission, Exhibit 16 (Doc. 204).

Cubic and the Government of Iran entered into a contract for sale of the ACMR on October 23, 1977 (the "Contract"). *Id.* Iran and Cubic recognized and provided in the Contract for the need to obtain U.S. government approval for export of the Items. In Section XI of the Contract, the parties provided for cancellation of the Contract if Cubic were unable to obtain either an initial license or a subsequent renewal. *See* Attachment 1 at § XI. The Contract also included a *force majeure* clause excusing Cubic for any delay, interruption, or failure to perform "due to any cause to the extent it is beyond CUBIC's fault or control." *Id.* at § XII(7).

In a memorandum dated May 15, 1979, Iran concluded that "continuation of the . . . contract is unprof-

itable [and] inadvisable," and that Iran wished to discontinue the Contract. Attachment 2.[1] The memorandum suggested that Cubic find another buyer for the Items. Attachment 2. Iran reiterated its decision to abandon the Contract in a memorandum dated May 29, 1979, stating that the "Air Force does not recognize the completion of the contract concerned advisable and profitable taking into consideration the lack of need to [sic] the subject system." Attachment 3. On June 10, 1979, Iran sent a letter to Cubic advising Cubic to take all necessary actions to sell the ACMR system. *See* Attachment 4 at 4.[2]

Cubic formally notified Iran on August 3, 1979 that Iran had breached the Contract, that the Contract was accordingly in default, and that Cubic would begin arrangements for sale of the ACMR to another buyer or buyers. Attachment 5. According to Cubic's letter, Iran's breaches included, *inter alia*, the failure: (1) to accept the Items; (2) to provide for shipment to Iran of Items that had been packaged and ready since February 1979; and (3) to pay Cubic the balance of the Contract price. *Id.* Cubic's notification also cited Iranian statements that Iran "would not or was unable to pay for the [Items]," and that "Cubic should take steps to sell the ACMR to another buyer." *Id.* Cubic reconfirmed its notice of default by correspondence to Iran dated Au-

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[1] The United States originally submitted Attachments 2, 3, and 5 to the Tribunal as exhibits to its Statement of Defense and Request for Dismissal for Lack of Jurisdiction (the "B/66 Brief") in Case B/66. *See Ministry of National Defence of the Islamic Republic of Iran v. United States*, Case B/66, Chamber 1, B/66 Brief (Sept. 15, 1982), Exhibits 1 and 2.

[2] Cubic provided this document to the United States.

gust 13, 1979 and September 9, 1979. *See* attachment 4 at 4.

Subsequently, Iran filed Case B/66 against Cubic and the United States in the Tribunal, seeking, *inter alia*, recovery for the same Items at issue here. The Tribunal dismissed Iran's claims for lack of jurisdiction. *Iran v. United States*, AWD 302-B66-1 (Apr. 28, 1987), *reprinted in* 14 Iran-U.S. C.T.R. 276. The Items are currently the subject of a pending proceeding brought by Iran before the ICC. *Iran v. Cubic Defense Systems, Inc.*, No. 7365/FMS (I.C.C. Court of Arbitration).

ARGUMENT

The United States should not be required to compensate Iran with respect to any of the Items. Iran has submitted no evidence to prove that it is entitled to such compensation. All Iran has submitted in support of its claim with respect to Cubic is a copy of the Contract listing the Items. Iran's Consolidated Submission, Exhibit 16.

In the interest of consistency, efficiency, and equity, the Tribunal should await the decision of the ICC in the pending arbitration before proceeding with respect to Iran's claim here. The United States requests that once the ICC renders its decision, Iran and the United States be provided an opportunity to exchange further pleadings.[3]

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[3] In any event, the facts show that Iran is not entitled to any compensation from the United States with respect to the Items. Iran did not have any ownership interest in the Items as of January 19, 1981, and they were therefore not the subject of any obligation of the United States under the Algiers Accords. In addition, Iran caused its own loss by breaching and repudiating the Contract. In any event, Iran assumed the risk of non-export of the Items.

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Case No. B/61
(including Case Nos. A3, A8, A/9, and A/14)
ISLAMIC REPUBLIC OF IRAN, CLAIMANT
v.
UNITED STATES OF AMERICA, RESPONDENT

Full Tribunal

REBUTTAL OF THE UNITED STATES TO CLAIMANT'S REPLY:

STATEMENT NO. 16
(CUBIC CORPORATION)

CLIFTON M. JOHNSON
Agent of the United States

GEORGE A. LEHNER
ALEC UGOL
MALLORY A. STEWART
Counsel

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Case No. B/61
(including Case Nos. A3, A8, A/9, and A/14)

ISLAMIC REPUBLIC OF IRAN, CLAIMANT,

v.

UNITED STATES OF AMERICA, RESPONDENT

Full Tribunal

REBUTTAL OF THE UNITED STATES
TO CLAIMANT'S REPLY:

STATEMENT NO. 16 (CUBIC CORPORATION)

INTRODUCTION

In its claim relating to Cubic Corporation ("Cubic"), Iran seeks additional compensation for property that has been the subject of extensive arbitration proceedings before the International Chamber of Commerce (the "ICC"). Indeed, Iran already received an award from the ICC of all the compensation to which it is entitled. Iran now brings this claim against the United States in an attempt to receive additional compensation,

compensation which would amount to an unjust enrichment in this case.

To advance its claims for additional compensation, Iran makes arguments before this Tribunal that directly contradict arguments it made before the ICC. During the course of its ICC arbitration, Iran argued that the contracts with Cubic were mutually terminated prior to January 19, 1981. To support its claim against the United States, Iran, now argues that the contractual relationship was *not* terminated. Moreover, Iran repeatedly asserted before the ICC that it had authorized Cubic to resell the property. Yet it now argues that the United States should have prevented the resale and returned the property to Iran.

Furthermore, Iran now seeks an inflated amount in compensation for the property. Even if the United States were somehow responsible for the property, Iran has failed to establish its alleged losses. Indeed, because Iran never had to pay the full contract price for this property, and because Iran has already been awarded over five million dollars in compensation plus interest, Iran, in fact, did not suffer any losses and most likely incurred a financial gain through the non-receipt of this property. In the absence of any evidence to support the United States' liability or any accurate way to assess Iran's alleged losses with respect to this claim, and given that this claim has been fully heard and decided by another international tribunal, this claim should be dismissed.

STATEMENT OF FACTS[1]

On October 23, 1977, the Imperial Iranian Air Force ("IIAF") and Cubic entered into two related contracts for the delivery and installation of an air combat system and the supply of spare parts. The first contract (the "Sales Contract," included herein as Exhibit 3) provided for the sale of an Air Combat Maneuvering Range ("ACMR") to be used by the IIAF. (Exhibit 3 at 1, Art. 1.) The total contract price was $18,068,670 (*id. at 2, Art. II*) with Iran making a 50% down-payment of $9,034,355 (*id.* at 6, Art. VIII). Under the Sales Contract, Iran agreed to make the remaining payments in four stages, as different milestones in the contract were met. (*Id.*)

In addition, Cubic was to establish two letters of credit within 30 days of the signing of the Sales Contract. The Sales contract required one letter of credit in the amount equal to one-half the contract price. Cubic would refund Iran's down payment with this letter if the

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[1] The following facts are taken, in part, from the International Chamber of Commerce International Court of Arbitration Award relating to the property at issue here. (*Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic International Sales Corporation*, no. 7365/FMS (ICC International Court of Arbitration May 5, 1997) *reprinted in* Mealy's International Arbitration Report, Vol. 13, Iss. 10 (Oct. 1998) at G-4, included herein as Exhibit 1. The ICC decided upon these facts after extensive briefing by Iran, and Iran has sued to confirm the ICC's Award in U.S. courts. (Iran's Petition for Order Confirming Foreign Arbitral Award, filed in the U.S. District Court for the Southern District of California, no. 98-CV-1165-B (June 25, 1998), included herein as Exhibit 2.) Accordingly, any attempt on Iran's part to dispute these facts would be in direct contradiction to its representations before U.S. courts and should therefore be disallowed.

contract were cancelled. The other letter credit was to be in the amount equal to 25% of the contract price, and would serve as Cubic's performance guarantee. (*Id.* at 13, Art. XII, ¶ 16.) Delivery under the Sales Contract was to be made in the United States, F.O.B., at Cubic's facility in San Diego, California (*id.* at 5, Art. VII) with Iran accepting delivery after performance of an in-plant acceptance test, and transporting the property to its final destination (*id.* at 4, Art. V).

Under the terms of the second contract between the IIAF and Cubic (the "Services Contract", included herein as Exhibit 4), Cubic was to install, service, and integrate the ACMR Instrumentation System and train Iranian troops in its use. Iran was to pay Cubic an additional $7,898,859 for this work. (*Exhibit* 4 at 2, Art. II.) The contracts were amended on August 8, 1978, to accommodate technical changes desired by the IIAF[2] with the amount due under the Sales Contract dropping to $18,012,170. (Exhibit 6 at ¶ A.2.)

Both contracts include a clause allowing Iran unilaterally to terminate the contracts, in writing, for its con-

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[2] (*See* "Contract Amendment Number 1," included herein as Exhibit 5; "Contract Amendment Number 2," included herein as Exhibit 6; "Contract Amendment O & M Number I," included herein as Exhibit 7.) Most of these design changes related to the IIAF's desire to house the ACMR in a building rather than in mobile vans. This necessitated the building of the housing structure and increased security. (Exhibit 5; Exhibit 1, Opinion at G-6, ¶ 2.3.) The IIAF's inability to complete the structure in a timely manner was a large factor in its decision not to accept the ACMR when it was ready for delivery in February 1979. (Memorandum from Brigadier General Imanian, Chief of Staff, Air Force of the Islamic Republic of Iran, to Deputy Ministry of National Defense for Armament, "Air Combat Maneuvering Range" (May 15, 1979), included herein as Exhibit 8, at ¶ 1.b.)

venience. (Exhibit 3 at 11-12, Art. XII, ¶ 12; Exhibit 4 at 12, Art. XI, ¶ 15). If Iran were to terminate for its convenience, Cubic would then have 90 days from the date of termination to submit a claim for expended funds and to seek a reasonable profit. (Exhibit 3 at 11, Art. XII, ¶ 12(c); Exhibit 4 at 13, Art. XI, ¶ 15(e).) If the parties could not agree on the final price to be paid upon termination for convenience, the matter was to be submitted to arbitration. (*Exhibit 3 at 13, Art. XII, ¶ 15; Exhibit 4 at 14, Art. XI, ¶ 18.*) A separate clause of the Sales Contract isolated Cubic from liability due to excusable delays. (*Exhibit 3 at 9*, Art. XII, ¶ 7.)

Between 1977 and 1979, the IIAF provided a 50% advance payment and two 10% progress payments. In sum, its payments to Cubic amounted to $12,608,519 of the $18,012,170 due under the Sales Contract. The IIAF also paid $302,857 of the $7,898,859 due to Cubic under the Services Contract. (Exhibit 1, Opinion at G-6, ¶ 2.2.)

In January 1979, James Jenkins, Cubic's Director of Contracts, visited Iran to review the in-country preparations being made to accept the system. After reviewing the situation in Iran and realizing that as a result of the political upheaval in the country Iran had failed to erect the required systems and materials enabling it to utilize the ACMR, Mr. Jenkins broached the possibility in a letter dated January 15, 1979 of the contracts being terminated and the system being resold.[3] In his letter, Mr. Jenkins estimated that the termination costs for the project would approximate the original $18 million con-

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[3] (Letter from James B. Jenkins, Director of Contracts, Cubic Corporation, to Colonel Rabii, Director of Projects, Imperial Iranian Air Force, "Air Combat Maneuvering Range" (Jan. 15, 1979), included herein as Exhibit 9, at 5.)

tract price. (Exhibit 9 at 5, ¶ E.10.) Iran never responded to the letter, and Cubic moved forward to complete the project. (Exhibit 1, Opinion at G-13, ¶¶ 9.1-9.3.)

In February 1979, Cubic informed the IIAF that the ACMR was completed and ready to be packaged for shipment and installation as scheduled.[4] At that time, the IIAF was to pay an additional $2,701,825 under the Sales Contract. The IIAF never made this payment, nor did it make a payment in the same amount due in March 1979. (Exhibit 1, Opinion at 18-19, ¶ 8.5; Exhibit 5 at 2, ¶ D.) Similarly, the IIAF failed to make an $85,000 payment due under the Services Contract in February 1979. (Exhibit 1, Opinion at 18-19, ¶ 8.5) Moreover, the IIAF failed to respond to *seven* separate inquiry letters forwarded by Cubic in February and March 1979. (*Exhibit 1, Opinion at G-13, ¶ 9.3.*)

On April 2, 1979, Major Makonei of the IIAF asked Cubic's representative in Iran, Ali A. Nomai, if a foreign country could buy the ACMR system. (Ali Nomai, Record of Telephone Conversation with Major Makooei, "Iran ACMR" (Apr. 2, 1979), included herein as Exhibit 11.) Mr. Nomai replied that, when the Iranian government decided what it wanted to do with the hardware, Cubic's contract people would be available to assist it. *Id.* Several days later, in a telex dated April 4, Cubic's Director of Contracts, James B. Jenkins, attempted to persuade the IIAF not to abandon the project, citing both the project's advantages for training Iranian pilots

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[4] (Telex from James B. Jenkins, Director of Contracts, Cubic Corporation, to Colonel Khatami, IIAF Purchasing Mission, "Contract for IIAF ACMR Dated 23 October 1977" (Feb. 23, 1979), included herein at Exhibit 10.)

and the large termination costs that Iran would face.[5] During a subsequent conversation between Mr. Nomai and the IIAF, Mr. Nomai noted that:

> [A]t the present time, [Cubic has] no immediate foreign customer for the ACMR and it may take a year or two before we do. However, in case of a cancellation, we will try to sell the hardware and deduct what the [IIAF] owes Cubic and then reimburse [the IIAF] for what amount is left.

(Ali Nomai, Record of Telephone Conversation with Major Safavi, "Iran ACMR" (Apr. 15, 1979), included herein as Exhibit 14.)[6] On May 15, 1979, the Chief of Staff of the IIAF wrote an internal memorandum to the Deputy Ministry of National Defense for Armament, discussing the consequences of terminating the contracts. The memorandum concluded that the IIAF: "does not have the possibility of complete exploitation of the [ACMR] and is not in the position of being able to apply such a system within at least the next five years of

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[5] (Telex from James B. Jenkins, Director of Contracts, Cubic Corporation, to National Iranian Air Force, Attention Brigadier General Mosttaffavi, "Air Combat Maneuvering Range (ACMR)" (Apr. 6,1979), included herein as Exhibit 12.)

[6] Because Mr. Nomai had become the spokesperson from Cubic in Iran, the IIAF requested a formal letter acknowledging Mr. Nomai's right to act on behalf of Cubic. A letter was forwarded on May 19, 1979, stating that Mr. Nomai "is empowered to negotiate all contractual matters regarding both of the subject contracts." *(Telex from Walter J. Zable, President, Chairman & CEO, Cubic Corporation, to Deputy Ministry of War, Attention Mr. Bahrami, "Contracts Dated 22 October 1977 for the Furnishing of an Air Combat Manuevering Range (ACMR) for the National Iranian Air Force" (May 19, 1979)*, included herein as Exhibit 13.)

time." (Exhibit 8 at ¶ 1.) The memorandum further stated that:

> [W]ith due regard to the lack of a need for the above mentioned system, [the IIAF] considers the continuation of this contract would be of no benefit and inadvisable and it is proposed that the continuation thereof would be abandoned and the purchased material and equipment be sold to the manufacturing corporation or through the corporation to another country.[7]

1. (Exhibit 8 at ¶ 2.)

On May 20, 1979, Mr. Nomai wrote a letter to the IIAF in Farsi, referencing the Sales Contract as having been "discontinued" or "halted" (depending upon the translation used) three months earlier, due to the special circumstances in Iran.[8] The letter indicated that the balance of $5,403,651 was due, pursuant to Article 12, Paragraph 12, the contractual provision authorizing Iran to terminate the Sales Contract "in whole or in part when it is in the interest of the Government." (Exhibit 15 at ¶ 3.)

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[7] According to the dissent of ICC Panelist Richard Mosk, Iran was picking and choosing during this period which military projects with U.S. contractors it desired to pursue and which it preferred to terminate. "It is a matter of public record that the new Iranian Government expressed its intention to review contracts with foreign companies, and to continue those contracts that it considered in Iran's national interest." (Exhibit 1, Mosk Dissent at G-50, p. 4 (quoting *Rockwell International Systems* v. *Iran*, AWD 438-430-1 at ¶ 92 (Sept. 5,1989), 23 Iran-U.S. C.T.R. 150, 171.))

[8] (Letter from Ali A. Nomai, Representative in Iran, Cubic Corporation, to Deputy Ministry of National Defense for Armament, "Air Combat Maneuvering Range" (May 20,1979), included herein as Exhibit 15 at 15.)

Cubic's letter further stated that "Cubic Corporation will try all possible ways to assist the Government of Iran to attain a decision and prevent the loss of time and money." (*Id.* at ¶ 9.) It detailed three alternatives by which this goal might be achieved: (i) all property could be shipped to Iran; (ii) Iran could take responsibility for selling the property; or (iii) Iran could give Cubic the authority to sell the property, and make all required modifications to the new customer's specifications prior to the sale, allowing Cubic to take a percentage of the proceeds to offset the costs of any reasonable customer modifications and a small percentage as a brokerage fee. (*Id.*)

On June 10, 1979, the IIAF gave Cubic permission to seek another purchaser. It specified that it should be notified of the offer prior to sale, but stated that it would give authorization for the sale if the offer was reasonable.[9] Cubic responded two days later, again stating that it "is ready to take any action with respect to the sale of the system to another country."[10] It pointed out, however, that "the possibility of the sale of the system as separate equipment (piece by piece) is more than the possibility of the sale of the system as a complete unit." (Exhibit 17)) Cubic further alerted Iran that: "one cannot possibly predict a specific and precise time for finding a proper buyer with an appropriate price. Furthermore, if a buyer would be found, . . . the time and cost

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[9] (Memorandum from Colonel Jahangear Kamkar, Deputy Minister of National Defense for Armament, to Cubic Corporation, "Air Combat Maneuvering Range" (June 10, 1979), included herein as Exhibit 16.)

[10] (Memorandum from Ali A. Nomai, Representative in Iran, Cubic Corporation, to Deputy Ministry of National Defense, "Air Combat Maneuvering Range" (June 12, 1979), included herein as Exhibit 17, at ¶ 3.)

to adopt the necessary changes for a purchasing country are unpredictable." (*Id. at* ¶ *4.*)

Finally, Cubic requested clarification with regard to: (1) the status of the Sales Contract; (2) the percentage of brokerage fee that would be acceptable; and (3) whether the IIAF would accept the costs for modifying the system to meet the specifications that would be required by any new customer. (*Id. at* ¶ *5*)

Cubic received no formal response to its letter of June 12, 1979. However, Cubic's Iranian representative attended two meetings in Iran over the next month. *(Exhibit 1, Opinion at G-13 -G-14, ¶¶ 9.11-9.14.)* At the second meeting, Iran formally requested that the system be sold on its behalf by Cubic. (*Id.* at G-14, ¶ 9.14.)

Based on the above, the ICC found that a common understanding had been reached in June and July 1979, that the contracts would be discontinued, and that Cubic would attempt to resell the equipment. (*Id. at G-14. G-15, ¶¶ 9.15, 9.21.*)

After Iran's 1979 agreement that Cubic could sell the Items to another buyer, Cubic sought other potential buyers for the air defense system. In 1981, Cubic sold pieces of the ACMR, as modified to the customer's specifications,[11] to the Government of Canada. (Statement of Michael L. Guenther, included herein as Exhibit 18, at ¶ 24.) Other pieces of equipment from the system were sold to the U.S. Government. (*Id.* at ¶ 33.) Iran acknowledged that it learned of the sale of the Items at

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[11] As noted above, Cubic had informed Iran that the ACMR system would have to be extensively modified to be marketable. (Exhibit 15 at 3.)

some point in early 1982.[12] Two years later, however, and knowing that the property had already been sold, the IIAF nonetheless wrote Cubic in February 1984 stating that the IIAF was ready to receive the ACMR system. (Telex trom IIAF to Cubic (Feb. 20, 1984), included herein as Exhibit 19.) The IIAF again wrote Cubic in December 1990, stating that it was "prepared to negotiate about receiving all equipment subject of the contract," even though the IIAF knew the property had already been sold pursuant to its own instructions.[13]

PROCEDURAL HISTORY

On January 19, 1982, Iran filed a Statement of Claim with the Tribunal against the United States Government and Cubic, based on the Sales Contract and the Services Contract. In that claim, Case No. B/66, Iran "allege[d] that Cubic failed to fulfill its contractual obligations to deliver, ship, install and operate the [ACMR] system." *Iran* v. *United States and Cubic*, AWD 302-B66-1 at ¶ 1 (April 28, 1987), 14 Iran-U.S. C.T.R. 276,276. On September 15, 1982, the United States filed a Statement of Defense and a request that the claim be dismissed against both respondents for lack of jurisdiction. *Id.* at

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[12] *See* Iran's Reply (Brief and Evidence in Answer to the United States' Consolidated Response to the Questions of Liability (Part I) and Compensation (Part II) Filed in Two Lots Under Docket Nos. 219-226 Dated 18 April 1995 And 236-242 Dated 14 August 1995): Volume XXI, Case No. B/61 (including Case Nos. A/3, A/8, A/9, and A/14), July 2,1999 (Doc. 330) [hereinafter Iran's 1999 Reply: Volume XXI (Doc. 330)], Statement 16 at 7 n. 6.

[13] Letter from M. Mohammadi, Deputy Minister of Defense and Support for the Army Forces in Parliamentary and Legal Affairs, to Cubic Corporation, "Contract date 23.20.1977" (Dec. 6, 1990), included herein as Exhibit 20.)

277, ¶ 2. On April 28, 1987, the Tribunal dismissed Iran's claim for lack of jurisdiction. *Id.* at 278, ¶¶ 9, 11.

On September 24, 1991, almost 5 years after Case No. B/66 was dismissed, Iran filed an ICC claim against Cubic, seeking an award of $45,000,000 for breach of contract and asserting that Cubic breached the agreement when it recalled its specialists from Iran in the winter of 1979. Cubic counter-claimed for breach of contract. *See generally* Exhibit 1. It appears from the ruling, however, that Iran changed its theory of recovery during the proceedings, shifting from a breach of the contracts based on Cubic's abandonment of the project, to a breach of an alleged modified agreement that Cubic would resell the system to a third party, and finally to a mutual ternination of the contracts by implication.[14] *Id.*

On May 5, 1997, the three judge ICC arbitration panel issued its Award in this case. The panel was split on its decision, with the chainman issuing the final Award over dissents from both party-appointed arbitrators.[15] The chairman found that the parties had implic

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[14] Significantly, Iran never argued that *it* had terminated the agreements for convenience, as Iran was solely entitled to do under the contracts' terms. If Iran had terminated for convenience, it would have been obligated to pay Cubic for the work performed plus the negotiated profit. Hence, given that the work was completed at the time that a termination would have occurred, to accept Iran's contention that the parties had implicitly agreed to terminate the contracts, one must accept that Cubic was willing to forfeit its right to full payment and profit, and receive no consideration for this forfeiture.

[15] In his dissent, Cubic's party-appointed arbitrator, Richard Mosk, stated that Cubic should not be held liable for any of Iran's claimed damages, as any damages were Iran's own fault. *See* Exhibit I, Mosk Dissent at G-49 - G-70. On the other side, Iran's party-appointed arbitrator, Dr. S. Jamal Seifi, argued that the parties mutually terminated

itly agreed: (1) to terminate the contracts; (2) that Cubic would sell the system on behalf of Iran, in whole or in parts, with appropriate deductions taken for the work that Cubic put in to modify the system; (3) that the sale price, less modifications, would be applied against the balance due, with the remainder returned to Iran. Ultimately, the Tribunal awarded Iran $2,808,519, plus interest at the rate of 12% per annum from September 24, 1991 until the date of the Award.[16] *Id.* at G-33, ¶ 20.5.

When Cubic refused to pay the award on the grounds that the ICC had gone beyond its jurisdictional mandate, Iran petitioned the U.S. District Court for the Southern District of California to confirm the award. *Ministry of Defense and Support for the Anned Forces of the Islamic Republic of Iran* v. *Cubic Defense Sys., Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998) ("Ministry of Defense"). In its petition, Iran argued that the parties had agreed to the resale of the system.[17] Cubic filed a

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the agreements in recognition of frustration of the contracts, and that under Iranian law, additional damages should have been awarded in favor of Iran. See Exhibit 1, Seifi Dissent at G-33 - G-48.

[16] The actual amount that Iran was awarded, including interest and costs, as calculated by Iran, comes to approximately $4,750,000. Letter from Dr. M. Akhavan, Director of Foreign Claims and Contracts, Ministry of Defense and Support for Armed Forces, to Chairman of Cubic Corporation, "ICC Case No 7365 MOD of Iran v. Cubic" (Aug. 11, 1997), included herein at Exhibit 21.

[17] Iran specifically argued: "[a]fter the revolution of 1979 in Iran, [the IIAF] expressed its willingness to sell the system to a third party through Cubic. This offer was accepted by Cubic. However, without notifying [the IIAF], Cubic sold the goods and never supplied [the IIAF] with the details of [or the proceeds from] the subsequent sale . . . These actions gave rise to the dispute which was the subject of the arbitration in Zurich, Switzerland." *Exhibit 2 at 3.*

cross-motion to vacate the award, asserting that the award exceeds the scope of the terms of the arbitration submission and ignores the terms of the parties' contracts.[18] Cubic further argued that it was not given a meaningful opportunity to present its case. *Ministry of Defense*, 29 F. Supp. 2d at 1174; Exhibit 22 at 30.

The district court confirmed the award on December 7, 1988. *Ministry of Defense*, 29 F. Supp. 2d at 1168. This ruling is now on appeal to the U.S. Court of Appeals for the Ninth Circuit. Cubic's Notice of Appeal, filed in the U.S. District Court for the Southern District of California, no. 98-CV-1165-B (Aug. 19, 1999), included herein as Exhibit 23.

PROPERTY CLAIMED

The property at issue consists of one Air Combat Maneuvering Range ("ACMR") system, and all necessary sub-parts [hereinafter the "Items" or the "property"]. *See* Exhibit 3 at 1, ¶ 1. There is no dispute that the property was within the jurisdiction of the United States on January 19, 1981. At some point before September, 1981, Cubic modified some subsystems of the ACMR to the specifications of the Canadian government. Cubic subsequently sold that property to the Canadian government on September 16, 1981, and the

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[18] *Ministry of Defense*, 29 F. Supp. 2d at 1172; Cubic's Memorandum of Points and Authorities in Support of Respondent Cubic Defense Systems, Inc.'s (1) Opposition to Petitioner's Motion to Confirm the May 5, 1997 ICC Arbitration Award and (2) Cross-motion to Vacate the May 5, 1997 ICC Arbitration Award, filed in the U.S. District Court for the Southern District of California, no. 98-CV-1165 (Oct. 9, 1998), included herein as Exhibit 22, at 8, 24.

property was thereafter transferred out of the United States. Its current location is unknown.[19]

There is no dispute that the property in question is on the United States' munitions control list and, accordingly, under U.S. law, requires an export-controlled license prior to export. *See* Exhibit 3 at 7, Art. XI; Exhibit 4 at 6, Art. X. Indeed, on May 13, 1977, before the two contracts were even signed, Cubic applied to the U.S. government for a license to export the hardware.[20] The U.S. Government granted this request on June 6, 1977 (License No. 03856). *Exhibit 24*. Cubic also received permission from the U.S. government on September 28, 1978 to export of the services necessary to perform its responsibilities under the Services Contract.[21] The license to export the hardware was twice renewed.[22]

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[19] It appears that four generators and four airborne instrument subsystems were not included in the package that was sold to Canada. Iran's 1999 Reply: Volume XXI (Doc. 330), Statement 16 at 1-2 n.1. Instead, some or all of this property was sold separately to the U.S. government. *See* Exhibit 18 (Guenther Statement), at 16-17, 19, ¶¶ 33, 36. The exact location of that property, both before and after January 19, 1981, is unclear from the evidence presented, but the United States does not dispute that these parts were within its jurisdiction.

[20] See Letter from William B. Robinson, Director, Office of Munitions Control, to Rosemary Anderson, Security and Safety Manager, Cubic Corporation (June 6, 1977), included herein as Exhibit 24, (referring to Cubic's application dated May 13, 1977).

[21] Letter from William B. Robinson, Director, Office of Munitions Control, U.S. Department of State to Rosemary Anderson, Security and Safety Manager, Cubic Corporation "MC Case 212-78" (Sept. 28,1978), with reference to Letter from Rosemary Anderson to William B. Robinson (Sept. 14, 1978), attached herein as Exhibit 25.

[22] U.S. Department of State Form DSP-5 (Application/License for Permanent Export of Unclassified Implements of War and Related Technical Data), License No. 059520 (May 17, 1978) attached herein as

The U.S. government export licenses for the property were suspended on November 28, 1979, long after the IIAF had indicated its desire to cancel the contracts and Cubic had declared the IIAF to be in material breach of the agreements.[23]

Exhibit 26; U.S. Department of State Form DSP-5 (Application/License for Permanent Export of Unclassified Implements of War and Related Technical Data), License No. 083431 (May 16, 1979) attached herein as Exhibit 27. It should be noted that, prior to November 1979, the export license for the Sales Contract property had been reissued at a dollar value which would allow the export of only $100,000 worth of property. Exhibit 27. Accordingly, as of November 1979, Iran would not have been entitled to export the full ACMR system (at an estimated value of approximately $18 million) under the then-current export license. As the Tribunal recognized in Partial Award 529, countries contracting to purchase export controlled property from U.S. companies assumed the risk that they would not be able to obtain a valid export license at a level sufficient to allow them to obtain the export controlled property. *Iran* v. *United States*, AWD 529-A15-FT ¶¶ 59-60 (May 6, 1992), 28 Iran-U.S. C.T.R. 112, 133-4. Accordingly, because the Tribunal has already upheld the validity of the U.S. export licensing system, and because the Algiers Accords only require the United States to compensate Iran for property that it was entitled to receive as of November 1979, this export limitation means that the United States should not be required to reimburse Iran for the ACMR, when Iran was not entitled to receive more than $100,000 of that system prior to November 1979. *See* Rebuttal of the United States to Claimant's Reply Brief and Evidence: Brief of the United States on Issues Common to Multiple Claims ("Common Issues Brief") at Part 1.A. Furthermore, because this pre-November 1979 export license determination had denied Iran's right to receive an ACMR worth more than $100,000, Iran cannot establish that the United States' subsequent March 1981 decision not to permit the exportation of export controlled property to Iran—in any way caused the non-transfer of the $18 million ACMR at issue in this claim. *See* Common Issues Brief at Part IV.C.

[23] *See* Letter from William B. Robinson, Director, Office of Munitions Control, U.S. Department of State, to Rosemary Anderson, Security and Safety Manager, Cubic Corporation (Nov. 29, 1979), attached here-

ARGUMENT

I. The United States Can Have No Liability For This Property Because, As Iran Argued, The Contracts Were Terminated Prior To 1981, And Thus Iran Did Not Have Title To The Items, Nor Did The United States Prevent Any Shipment of The Items To Iran.

Because Iran has made extensive arguments before the ICC that the contracts at issue had been terminated prior to January 19, 1981, the Tribunal must dismiss Iran's arguments to the contrary in this claim. Iran may not, in good faith, receive an award against Cubic in the ICC proceeding by arguing that the contracts were terminated in 1979, and then seek additional compensation from the United States before this Tribunal by arguing that the contracts were still in effect as of January 19, 1981. Moreover, Iran has maintained both before the ICC and in U.S. courts that it authorized the resale of the Items to a third party prior to January 19, 1981. *See* Exhibit 1; Exhibit 2. Iran may not now argue that the United States is liable for failing to intervene to prevent this resale and return the Items to Iran in contravention to Iran's own instructions. Because Iran's arguments are entirely inconsistent, this claim should be dismissed.

Even if Iran's representations before the ICC did not preclude it from presenting contradictory arguments in this proceeding, however, the evidence shows that Iran lost title to the property at issue before January 19,

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in as Exhibit 28 (Suspending export license 83431); Letter from William B. Robinson, Director, Office of Munitions Control, U.S. Department of State, to Rosemary Anderson, Security and Safety Manager, Cubic Corporation (Dec. 5, 1979), attached herein as Exhibit 29 (Ordering Cubic to suspend providing its technical assistance to Iraq, as well).

1981, either through its own termination or its own breach of the contracts. Moreover, Iran has entirely failed to present evidence or arguments that the United States was in any way responsible for Iran's alleged losses. Accordingly, Iran is not entitled to any compensation from the United States under the Algiers Accords.

A. Iran Maintained Before The ICC And U.S. Courts That The Cubic Contracts Were Terminated Prior To January 19, 1981, And That Iran Wanted The Items Sent To A Third Party, And Iran Cannot Be Heard To Argue Otherwise Before This Tribunal.

On May 5, 1997, the ICC ordered Cubic to pay nearly $5 million in reimbursement and interest to Iran based, in part, on Iran's arguments that the contracts between the two parties had been terminated in 1979. *See* Exhibit 1, Opinion at G-33, ¶ 21; Exhibit 21. Indeed, the ICC Award explained that Iran relied on the testimony of its Iranian Law expert to demonstrate that the May/June 1979 negotiations between the IIAF and Cubic had resulted in the mutual termination of the contracts: "By referring to Dr. Vahedi's [Iran's expert] characterization of the communications regarding resale [of the Items], [Iran] made it clear that it agreed with Vahedi's view that the resale agreement had an essential element in it, namely, mutual termination of the Contracts." *Exhibit 1, Opinion* at G-18, ¶ 11.6.

Moreover, in Iran's Motion to have the ICC award enforced in the U.S. District Court for the Southern District of California, Iran specifically recognized that as of 1979 it no longer wanted the property returned to it. Iran specifically stated that: "[a]fter the revolution of 1979 in Iran, [the IIAF] expressed its willingness to sell

the system to a third party through Cubic. This offer was accepted by Cubic." Exhibit 2 at 3. Because Iran specifically argued that it did not want the Items returned as of 1979, and even asked that these Items be sold to a third party, it cannot argue that the United States had an obligation to return the property to Iran in 1981.

Under internationally accepted principles of law, and as a result of previously arguing that the contracts had been terminated in 1979, Iran is estopped in these proceedings from arguing that the contracts were still in effect as of January 19, 1981.[24] Because, as Iran argued before the ICC, the contracts were terminated during the 1979 negotiations between the IIAF and Cubic, and under the Sales Contract title only passed upon performance of the contract, Iran had no title to the property at issue in January 1981. *See* discussion in Section B below. Accordingly, the United States had no obligation to return that property to Iran under the Algiers Accords. Alternatively, if Iran revoked the contracts and sought Cubic's assistance in reselling the Items to a third party in 1979, as it argued before the U.S. District Court, the United States was under no obligation to thwart Iran's wishes and return the Items to Iran. Either way, Iran cannot argue that the United States should be held responsible for the return of these Items in January 19, 1981. Accordingly, this claim must be dismissed.

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[24] *See* MacGibbon, Estoppel in International Law, 7 Int'l Law and Comp. L. Q. 468, 468-69 (1958) ("Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation"); *accord*, B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, 141-42, 146, 157 (1953).

B. Iran Did Not Have Title To The Property On January 19, 1981, And Therefore The United States Has No Responsibility For The Property Under The Algiers Accords.

Whether or not Iran is held to its representations that the contracts with Cubic were mutually terminated, the evidence shows that these contracts were indeed terminated prior to delivery. Accordingly, under Iranian law, Iran did not have title to the Items. Paragraph 9 of the General Declaration does not obligate the United States to compensate Iran for property that was not under Iranian title. See "Common Issues Brief" at Part J.A.; Part IV.E. Moreover, Iran's own actions prevented the delivery of these Items, and the United States should not be held responsible for their alleged loss.

1. Even Where The Contract Specifies That Iranian Law Applies, Title Would Not Have Passed To Iran At The Time Of Contracting; Because The Sales ContractWith-Cubic Involved The Sale Of Newly Produced Property.

In its most recent filings before the Tribunal, Iran argues that even if there was a complete termination of the contracts, it still had title to the Items under Iranian law. *See* Iran's 1999 Reply: Volume XXIV (Doc 333), Statement 16 at 10. However, Iran must prove that title for the claimed property passed to Iran before January 19, 1981, even if the particular contract specified that Iranian law applied. Aside from its bald assertions that Iranian law allowed for the transfer of title, Iran fails to satisfy its burden of proof that title actually transferred. Indeed, as discussed below, because there was no deliv-

ery of the newly produced Items, Iranian law does not provide for the transfer of title to Iran. *See* Common Issues Brief at Part IV.E.5.

Iran claims that once a contract is entered into, the title of the contracted-for property always and immediately transfers to the buyer.[25] Under Iranian law, however, title passes at the time of the execution of the sales contract only with respect to goods that exist and are specifically identified by the contracting parties as the subject matter of the sale at the time of the execution of the sales contract ("identified goods"). *See* Common Issues Brief at Part IV.E.5.b.. Title does not pass at the time of contract in the sale of goods that do not then exist, such as property that will be produced in the future under the terms of the contract ("non-identified goods"). *See id.* Title to non-identified goods,[26] such as

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[25] *See* Iran's Reply (Brief and Evidence In answer to the United States' Consolidated Response to the Questions of Liability (Part I) And Compensation (Part II) Filed In Two Lots Under Docket Nos. 219-226 Dated 18 April 1995 And 236-242 Dated 14 August 1995): volume I General Points of Liability and Damages Part 1 of 3: The Text, Case No. B/61 (including Case Nos. A/3, A/8, A/9, and A/14), July 2,1999 (Doc. 310) at 73-75.

[26] Iranian law differentiates between two types of contracted-for goods, identified and non-identified goods. "Identified goods," which in Persian are called "*ein moayan:*" denotes such goods that exist and are distinctly identified by the parties to a sales contract at the time they enter into such contract as the goods constituting the subject matter of their sales contract "Non-identified goods," which in Persian are called "*kolli*" or "*kolli fe zemeh*," denotes such goods that do not exist at the time of the sales contract - or if they exist at such time, they are not identified by the contracting parties as the subject matter of the sales contract. For instance, "A" visits the office of a car dealer and signs a contract for the purchase of ten cars which, at that time, may not have been manufactured or owned by the dealer. Thus, in the sale of non-

the newly produced ACMR system at issue here, passes only upon delivery. *Id.*[27] Therefore, because Iran never paid the final amount due under the Sales Contract and because there was no arrangement for shipment or delivery of the Items, title to the non-identified goods in this claim never passed to Iran. *See* Common Issues Brief at Part III.E.2.

2. Iran's Own Actions Prevented It From Obtaining Title To The Items.

Cubic performed all of its obligations under the Sales Contract up to the moment of Iran's obligation to pay for and accept delivery of the completed property. Cubic produced the ACMR on schedule. Exhibit 10. At that time, under the Sales Contract, the IIAF was required to pay Cubic $2,701,824 and then another $2,701,824 in March 1979. It is uncontested that the IIAF failed to make either of these required payments, effectively breaching the Sales contract, even though Cubic had performed its obligations in full.

Because Iran refused to pay the agreed upon price for Cubic's production of the Items, Iran failed to perform its obligations under the Sales Contract. As a result of its non-performance, or breach, delivery of the

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identified goods, the seller needs to manufacture, produce, or procure such goods and deliver them to the purchaser. Hence, in the sale of non-identified goods, the delivery of the goods constitutes an essential element of the sale. *See* Common Issues Brief at IV.E.5..

[27] Moreover, under the terms of the Sales Contract, delivery was to be made "F.O.B." at Cubic's facilities in San Diego, California. *See* Exhibit 3 at 5, Art. VII. For delivery to be completed under internationally recognized definitions of "F.O.B." the property must be placed on board the shipment carrier. *See* UCC § 2-319; see also Common Issues Brief at Part III.E.4.

Items was never made. Accordingly, Iran did not receive title to the Items, and the United States cannot be required to compensate Iran for this property.

In the ICC hearing, Iran argued that its actions did not constitute breach of the contracts because there was mutual agreement between the parties to terminate the contracts. *See* Exhibit 1, Opinion at G-18 -G-21, ¶¶ 11.1-11.28.[28] (Cubic disputes this point, however, and argues that Iran breached the contract.[29] Iran states that after tennination of the contracts, the parties agreed that the Items would be resold to a third party and that the proceeds would go to Iran. Even if this were the case, which Iran has failed to sufficiently support, Iran does not explain why the United States should be responsible for not interceding to prevent the resale. Iran seems to suggest that the United States should have transferred the Items to Iran despite Iran's admission that it did not have the capability and resources to utilize the ACMR System and despite Iran's specific desire to have the Items resold to a third party. If the United State had indeed interfered with Cubic's resale of the Items, Iran would not have been able to seek additional compensa-

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[28] Iran relied on the Iranian legal concept of "Eghaleh" to explain that the contracts were implicitly terminated by mutual agreement. *See* Exhibit I, Opinion at G-18 - G-19, ¶¶ 11.9-11.13. This concept requires, however, that there be an "unambiguous mutual consent" or a "meeting of the minds" between the parties to dissolve the contract. *Id.* at G-18, ¶ 11.10. As the ICC correctly concluded, Cubic never consented to termination in the absence of Iran's payment of the remaining $5,403,651 it owed under the contracts. *Id.* at G-19, ¶ 11.20

[29] In Judge Mosk's dissent, he also concludes that there was no termination of the contracts, but instead Iran breached the contracts. Exhibit I, Mosk Dissent at G-62, pp 41-2.

tion from Cubic before the ICC for failing to forward the proceeds of the Canadian sale to Iran.

Regardless of the precise manner in which the original Sales and Services contracts were terminated, these contracts were no longer in effect as of January 1981. In the absence of a contract, Iran's title to the Items was clearly in question as of that date. Because Iran has failed to prove that it obtained clear title to these Items as of the valuation date, the United States can have no liability for them under Paragraph 9. *See* Common Issues Brief at IV.E.

C. Because Any Losses Iran Suffered Were A Direct Result Of Its Own Actions, Any Award On This Claim Would Place Iran In A Better Position Than It Was In As Of November 1979.

As a result of Iran's actions, Iran no longer had title to these Items as of November 1979. Iran had also agreed before November 1979 that Cubic would attempt to resell the Items to a third party. Because any claim for compensation can only be derived from the termination of contractual relations between the IIAF and Cubic, there is no justification for holding the United States responsible for the transfer of these Items. Indeed, any losses associated with the termination of contractual relations between Cubic and the IIAF has already been arbitrated and decided by a competent tribunal. To award any additional compensation on this claim now would not only unjustly enrich Iran, but it would also require the United States to place Iran in a superior position to its November 1979 status, a requirement that is contrary to the mandates of the Algiers Accords.

The ordinary meaning of General Principle A of the Algiers Accords is clear. The Principle requires that: "Within the framework of and pursuant to the provisions of the two Declarations . . . the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") (Jan. 19, 1981) (1 Iran-U.S. C.T.R. 3), General Principle A. The United States must "restore"—not improve—Iran's financial position as of November 1979. *See* Common Issues Brief at I.A. As of November 1979, Iran had not paid Cubic for the completion of the contracts, had effectively terminated the contracts, and had instructed Cubic to resell the Items. Accordingly, under the plain language of the Accords, Iran should not receive any compensation from the United States on this claim.

Because it was Iran's failure to abide by the terms of the Sales Contract, and Iran's alleged termination of that contract prior to November 1979 that resulted in the non-transfer of the Items, Iran should not recover from the United States for any associated losses. Importantly, there is no evidence in the record that the United States had any responsibility for the non-shipment of the Items to Iran. Indeed, the evidence shows that the U.S. export licenses were granted and renewed in advance of any expected shipment. *See* Exhibits 24-27. Because Iran has not provided any evidence that the United States prevented Iran from receiving these Items or had any responsibility for their transfer to Iran, the United States should not be held responsible for their loss. Moreover, under the express terms of the Algiers Accords, the United States is not required to compensate Iran for these Items.

In sum, Iran has already received an award against Cubic for nearly $5 million in reimbursement/compensation on its claims brought pursuant to these contracts. This award was granted to Iran based on Iran's arguments that the contracts had been terminated prior to 1981. The ICC also considered Iran's representations that Cubic's resale of the property was on Iran's behalf under a new agreement between the parties. *See* Exhibit 1, Opinion at G-8, ¶ 5.1. Iran may not argue before this Tribunal that the Sales contract was still in effect as of January 19, 1981, merely to receive further compensation on this claim. Moreover, Iran has failed to prove that it had title to the Items as of January 19, 1981. Finally, Iran has failed to allege that the United States was in any way responsible for any loss of the Items. Because any recovery from the United States based on these same contracts would unjustly enrich Iran, the Tribunal should dismiss this claim.

II. The United States Cannot Be Required To Compensate Iran Where Iran Has Failed To Show Its Losses.

If the Tribunal determines that Iran is entitled to further compensation on this claim, the United States can only be responsible for Iran's actual losses with regard to the Items, calculated as the fair market value of the Items on the valuation date, minus any amounts Iran still owes Cubic for the Items' production and resale, any amounts Iran would have had to pay for the shipment of the Items, and any amounts that Iran has already been awarded as compensation for the non-transfer of the property. *See* Common Issues Brief at V. Iran completely ignores these factors and instead seeks the full September 1981 price that Cubic negotiated with Canada for the purchase of the modified ACMR system:

$17,139,046.50. Iran's 1999 Reply: Volume XXI (Doc. 330), Statement 16 at 1. Iran also adds the alleged price for 4 generators and 4 airborne instrumentation subsystems that were apparently not sold to Canada in that transaction. *Id.* at 1-2. Iran seeks a total amount of $18,401,008.50 for the Items. *Id.* at 2. Because Iran fails to take into account any amounts it owes Cubic in its calculations, any amounts Iran would have had to pay for shipment of the Items, or any amounts it has already received as compensation for these Items, Iran's asserted losses are entirely incorrect, and the Tribunal should dismiss this claim.

To the extent that the Tribunal nevertheless awards Iran additional compensation, the compensation amount should be made in accordance with the report prepared by the independent valuators, Ernst & Young LLP ("Ernst & Young"). *See* Ernst & Young, LLP Valuation Analysis of Certain Assets with Respect to which Iran Asserts Claims in Case B/61, as of March 26, 1981, Cubic Defense Systems, Statement 16, included herein as Exhibit 30. According to the E&Y Report, any compensation amount cannot exceed $5,130,000, the estimated fair market value of the saleable portion of the ACMR system that Iran originally sought to purchase from Cubic. *See* Exhibit 30 at ii. If the Tribunal awards Iran the full fair market value of the Items, it is assuming that the contracts were not terminated by Iran's actions, and thus the amounts that Iran still owes Cubic under the Sales contract should be deducted from this fair market value.

A. Any Compensation On This Claim Must Be Reduced By The Amount Of Money That Iran Saved By Not Receiving The Items.

Ernst & Young estimated the fair market value of the Items utilizing the Cost and Market Approaches.[30] Mainly based on the Canadian contract price for the Items, reduced by the remaining technical life span of the parts, Ernst & Young estimated that in March 1981 the Items had a total fair market value of $5,130,000. Exhibit 30 at 7. Under Tribunal precedent, however, Ernst & Young's determination of fair market value must be reduced to account for any amounts that Iran would have to pay to receive the Items. *See* Common Issues Brief at V.C.2. According to the Sales Contract, after Cubic had made the Items available for Iran's inspection and shipping, Iran had to pay an additional $5,403,651 for Cubic's completed production of the property.[31] Additionally, under the Contract, Iran would have been responsible for the costs of shipping the Items to Iran. *Exhibit 3 at 5, Art. VII.* If the Tribunal awards Iran the estimated fair market value of the Items, it should subtract the amount Iran owed Cubic for the final production of the Items, because Iran saved this amount of money by not receiving the Items. In other words, the Tribunal must subtract $5,403,651 from

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[30] These valuation approaches are described in further detail in: Ernst & Young, LLP Valuation Analysis of Certain Assets with Respect to which Iran Asserts Claims in Case B/61, as of March 26, 1981, for the Common Issues Brief.

[31] *See* Exhibit 5; Exhibit 6 (the 30% due under Milestones 3 & 4 in "Contract Amendment Number 1" multiplied by the $18,012,170 total price set by "Contract Amendment Number 2").

Ernst & Young's estimate of $5,130,000, the fair market value of the Items in March 1981. Moreover, the Tribunal must subtract the cost of shipping all of the property to Iran, a cost that Iran agreed to pay under the Sales Contract. *Id.* Because Iran actually saved money by not receiving the Items, this claim should be dismissed.

B. Any Amount Of Compensation On This Claim Must Be Reduced By The Amounts That Iran Has Already Received As Compensation For These Items.

Moreover, Iran has failed to deduct any amounts that it has already received as compensation for this property. The Tribunal's case law requires a claimant to adjust a compensation request to take these factors into consideration. *See* Common Issues Brief at V.C. Indeed, the Tribunal has specifically recognized the applicability of settlement agreements and collateral decisions, even absent privity of contract with the United States and even as to different causes of action. *See Futura Trading Incorporated v. National Iranian Oil Company*, AWD 263-324-3 at ¶ 62 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99, 116; *Itel Corporation v. Iran*, AWD 530-490-1 at ¶ 36 (June 8, 1992), 28 Iran-U.S. C.T.R. 159, 174. If the Tribunal awards Iran any compensation on this claim, it must deduct the amounts that Iran has already been awarded for these Items by the ICC: a total amount of $4,751,069.00 in compensation and interest. Exhibit 22.[32]

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[32] Indeed, Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent a letter to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the ICC Award it would "be recouped from the remedy sought

In sum, if the Tribunal awards Iran any compensation on this claim it would be ordering the United States to place Iran in a superior position than it was in as of November 1979. This is against the general principles of the Algiers Declarations. Moreover, any compensation on this claim would unjustly enrich Iran because it would provide Iran with the value of Items which Iran never fully paid for, or obtained title to, and it would also afford double compensation to Iran for claims on which Cubic is already obligated to pay full compensation.

CONCLUSION

The Tribunal should dismiss this claim in its entirety. Iran has already received an award relating to these Items from Cubic based on the argument that the contracts were mutually terminated in 1979, and Iran should not be allowed to re-allege claims for this property against the United States based on contradictory arguments. Iran has argued that the contracts with Cubic, which were governed by Iranian law, were terminated prior to delivery, and Iranian law is clear that sales contracts for the production of future goods do not confer title absence completion of the contract and delivery of the Items. Moreover, Iran asks the Tribunal to

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against the United States in Case B61." Letter from M.H. Zahedin-Labbar, Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999), included herein as Exhibit 31; *see also* Iran's 1999 Reply: Volume XXI (Doc. 330), Statement 16 at 3 n.2 (stating that any amount received from Cubic "will be recuperated from the remedy sought" in this case.). Iran must not be allowed to seek additional compensation from the United States when it is presently enforcing an award against Cubic that covers the very same losses that Iran allegedly suffered.

grant an award of the full value of the property, despite the uncontested fact that Iran failed to make the final required payments for this property under the Sales contract, tallied at nearly $5 million. In sum, if the Tribunal grants this claim, it would: (1) allow Iran to seek double compensation based on inconsistent assertions of fact; (2) it would reward Iran for having failed to fulfill its obligations under the Sales contract; (3) it would place Iran in a superior position than it was in as of November 1989; and (4) it would hold the United States responsible for the results of Iran's own actions. Neither the Algiers Accords nor internationally accepted principles of equity support such a holding; and accordingly, this claim should be dismissed.

Respectfully submitted,

/s/ CLIFTON M. JOHNSON
CLIFTON M. JOHNSON
Agent of the United States

[Symbol Omitted]

AGENT OF THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN TO THE IRAN-U.S. CLAIMS TRIBUNAL THE HAGUE

IN THE NAME OF GOD

[No. 34188]
[Date: Jan. 14, 1999]

URGENT

Mr. Allen S. Weiner
Agent of the United States of America
Iran-U.S. Claims Tribunal
Parkweg-13
The Hague

Re: Case No. B61
(CUBIC DEFENCE SYSTEMS INC.)

Dear Mr. Weiner,

As you know one of the important cases still pending before this Tribunal is Case B61. The subject-matter of this Case is the United States' obligation under Paragraph 9 of the General Declaration for the transfer of a series of Iranian military items remaining on the U.S. soil through 19 January 1981. The defence articles at issue in Case B61, at variance with case B1, have been purchased directly from the private U.S. companies. One of such companies is CUBIC DEFENCE SYSTEMS INC. (Hereinafter referred to as "CUBIC"). *See* Doc. 204. (Exh. 16). The property at issue is an Air Combat Maneuvering Range ("AMR"), an electronic air

combat training system. The manufacture of this equipment was already complete by 19 January 1981 and was sold by CUBIC to the Canadian Government on 16 September 1981. As a result Iran's remedy with respect to this company is in the main the price at which the AMR was sold, i.e. U.S. $17,139,046.50.

In the meantime, an ICC arbitral tribunal, called upon to resolve the dispute between the Iranian Ministry of Defence and Support for Armed Forces and CUBIC, made an award of damages in the Ministry's favour in the amount of U.S. $2,808,519 plus interest (hereinafter referred to as "Awarded Amount"). *Islamic Republic of Iran* v. *Cubic Defence Systems Inc.* (hereinafter referred to as "ICC Award"). A copy of the ICC award is attached.* The Awarded Amount, if received, is naturally to be recouped from the remedy sought against the United States in Case B61.

Iran took the necessary action to enforce the ICC Award at the United States District Court, Southern District of California. The Court granted Iran's Petition for Confirmation of the Foreign Arbitral Award on 12.7.1998. *See* Court's Order attached. While the enforcement procedure was running its course, the so-called judgment creditors in *Stephen M. Flatow* v. *The Islamic Republic of Iran, et al* moved to garnish the Awarded Amount. *See* Garnishment Summons attached. The Court—apparently District Court for Alexandria, Virginia—is to decide the motion for garnishment TOMORROW, 15 January 1999.

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* This Award, as argued in Iran's pleadings to be filed, does not enjoy *res judicata* in Case B61 for lacking all the three otherwise required identities of parties, object and subject matter.

In view of the fact the Awarded Amount constitutes an integral part of the remedy sought in Case B61 pursued within the framework of the Algiers Declarations, you are requested to ask your Government to advise the Court, through a Suggestion of Interest or as otherwise deemed appropriate, of the context in which the enforcement of the ICC Award is to be viewed, preventing it from granting such a motion due to the incompatibility of such interferences with the United States' commitments under the Algiers Declarations. The United States has made such a required intervention in the enforcement process of an award in Case A27, (AWD No. 586-A27-FT) to impede the attachment of the awarded amount. This Awarded Amount unless received by Iran, cannot be offset against any relief which the United States may be found to owe Iran with regard to CUBIC in Case B61.

To conclude, Iran understands that any action the United States might take with respect to this request will be without prejudice to any positions taken, or to be taken, by the Parties in Case B61 respecting CUBIC.

Yours sincerely,

[ILLEGIBLE]
M.H. ZAHEDIN-LABBAF
Agent of the Islamic
Republic of Iran